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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 411.

THE CITY OF DETROIT, THOMAS B. LUCKING, AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 4, 1900.

(17,896.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 15, 1901.

1-3 *Bill of Complaint.*

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

To the judges of the circuit court of the United States for the eastern district of Michigan, southern division, in equity:

Your orator, Ralzemond A. Parker, respectfully shows unto this honorable court:

1. That he is a citizen of the State of Michigan and a resident of the eastern district thereof, and files this his bill of complaint against the City of Detroit, Thomas M. Lucking, and William B. Thompson, citizens and residents of the said eastern district of Michigan.

2. That the said City of Detroit is a municipal corporation organized under a special charter enacted and granted by the legislature of the State of Michigan; that whatever governmental powers it possesses it has received the same by virtue of direct and express grant from the State of Michigan by said charter, and it has and possesses no other legislative capacity except such as is granted by the terms of its said charter; that said charter provides for the grading and paving of streets, making assessments for paying the expenses thereof, and selling the land for non-payment of such assessments; which provisions of said charter, so far as they are material to this controversy, are as follows:

Charter of the City of Detroit.

CHAPTER VII.

SEC. 33. The common council shall have power to make, grade, improve and adorn the public squares, spaces, grounds and
4 parks belonging to or under the control of the corporation, and to control and regulate the same inconsistently with the purposes and objects thereof. It shall have power to establish, open, widen, extend, straighten, alter, vacate and abolish highways, streets, avenues, lanes, alleys and public grounds or spaces within said city; and to grade, pave, repair and otherwise improve the highways, streets, avenues, lanes, alleys or interior public spaces created by the intersection of streets, cross-walks and sidewalks, in said city, with stones, wood, brick or other material; and the common council shall have full power and authority to provide for the paying the costs and expenses thereof, by assessment in such manner as shall be prescribed by law, which assessment shall be a lien, until paid, on the lot, lots or premises on which the same are bounded, and shall be collected in such manner as shall be authorized by law; provided, that the costs and expenses of all repaving and repairing of streets, avenues and highways within the city shall be paid by the city out of the repairing fund created and raised for such purpose. The said common council may also provide for working and improving all highways, streets, avenues, lanes, alleys

and public spaces within said city, and may assess and levy upon the taxable property within said city, and may expend such highway taxes therefor as may be necessary, and may elect whether the same shall be collected in money or labor in such amount as the common council shall prescribe for each ward respectively: Provided, such highway taxes shall not in amount exceed the rates now fixed by law, and the same shall be assessed, levied and collected as other taxes. (As amended by act approved June 24, 1887.)

CHAPTER X.

SEC. 11. The owners or occupants, or parties in interest to any real estate assessed under this chapter, shall be liable to pay every such tax or assessment, and if the same shall not be paid by the first day of February following, or any part thereof, it shall be lawful for the receiver of taxes to cause a notice to be published in the official daily newspaper for the city, once a week for four successive weeks, and posted in three or more public places in each ward, requiring the owners or occupants of, or parties interested in such lands, tenements, hereditaments or premises, to pay such assessment or tax, and that if default be made in making such payment, such real estate will be sold at public auction, at a day and place to be specified in said notice, for the lowest term of years at which any person shall offer to take the same, in consideration of advancing and paying such assessment or tax, with the additions provided in this act, and the cost and expense of advertising. The common council in its discretion may cause said notice, or any part thereof, to be published in a German newspaper in said city: provided, that all publications in languages other than English shall not exceed the sum of twenty-five hundred dollars per annum, now authorized by the charter of the city of Detroit.

SEC. 12. If the owner or occupant of, or parties in interest in such real estate, do not pay such assessment or tax, with costs, additions and charges, within the period above prescribed for the publication of said notice, then the said receiver shall have the power, without any further notice, to cause such real estate to be sold at public auction, for the lowest term of years at which any person shall offer to take the same, in consideration of advancing such assessment or tax, with the costs, additions and charges, and to direct the execution of a proper certificate of such sale to the purchaser thereof; and if such real estate shall not be redeemed within one year after such sale thereof, as hereinafter provided, the controller shall, in the name of the city of Detroit, execute and deliver to, such purchaser, or his assignee, a proper deed for the conveyance of such real estate for the term for which the same was sold; which deed shall be *prima facie* evidence of the regularity of all the proceedings under which the sale was made and said deed was executed, up to the date of such deed. Any person, who, under such deed, may enter into such real estate, and erect or place any building or other property thereon, shall have the right at the expiration of said term, or in case he shall be ousted before the expiration of such term by any person claiming adversely to said deed, then, within

three months after trial, judgment or ouster or ejectment, to remove said buildings or property from said real estate. And in all sales of land for taxes aforesaid, if the purchaser or its assigns, shall die before a deed or other conveyance shall be executed on such sale, the deed may be executed by the controller to and in the name of the purchaser or assigns, who, if living, would be entitled to a deed of conveyance, which deed or conveyance shall vest the title in the heirs or devisees of such deceased persons in the same manner, and liable to like claims of creditors and other persons as if the same had been executed to such deceased person immediately previous to his death, or the executor or administrator may assign the certificate of purchase, and the deed of conveyance may issue to the assignee thereof; and in like case, which have heretofore occurred, the same rule shall apply, and all deeds and conveyances heretofore issued in the name of any deceased person, who, if living at the time of
7 the execution thereof, would have been entitled thereto, shall have like effect as above provided.

SEC. 17. The controller, or in his absence the mayor may execute in the name of the corporation, and under its corporate seal, proper conveyances and certificates of sale of all lands, tenements or hereditaments, sold for assessments or taxes, which, when duly acknowledged and attested by the city clerk, may be recorded as other conveyances of land under the laws of this State.

SEC. 18. It shall be the duty of the controller to bid in for the corporation, at any sale of real estate for assessments or taxes, every lot of land or premises for which no person shall offer to bid; and if any purchaser shall refuse or neglect to pay the sum or sums bid by him, within the time and under the regulations prescribed by the common council, such bids shall enure to the use and benefit of the corporation, if the common council so elect. Upon all such bids by the controller, and all bids as aforesaid, to the use and benefit of the corporation, conveyance and certificates of sale may be executed by the controller to the corporation, acknowledged and attested by the city clerk, and recorded in the same manner as provided in other cases of sale for assessment or taxes. But in all cases of sales, for special assessments, the property so bid in for the corporation may, at the option of the common council be held in trust for the person or contractor in whose behalf such assessment shall have been made, or his assignee, or upon payment to such person or contractor of the amount for which said property shall have been bid in, the city may, as in case of the general tax, become the owner of the tax title or lease thus obtained, and may dispose of the
8 same as if obtained under a like sale for any general tax.

SEC. 20. Assessment-rolls to defray the expense of constructing lateral sewers, side and cross walks, paving, grading, macadamizing, graveling or otherwise improving streets, lanes, or alleys, or for defraying the expense of any local improvements properly payable from the proceeds of special assessments, shall be placed in the hands of the receiver of taxes for payment, as may be provided by ordinance or resolution of the common council for the space of thirty days, after which warrants for the collection of the same may

be issued, and such proceedings for the collection thereof be had as are or shall be prescribed by law, or by any ordinance or resolution of the common council and sales of any real or personal estate for any unpaid assessment shall be made in like manner, and with like effect as in the case of sales for the non-payment of the general tax.

CHAPTER XI.

SEC. 33. Whenever the common council shall order any street, or any portion thereof, to be graded, or graded and paved, or repaved, it may enter into contract for the making of such improvement according to the provisions of this charter, and after the cost and expense thereof has been ascertained it shall cause the same, except the cost of repaving, the cost of cross-walks and of the work at the intersections of cross-streets, to be assessed upon the lots and real estate herein made subject to such assessment as hereafter provided. In case of every contract for paving, the work to be performed thereunder shall be commenced and completed between the first day of May and the first day of November in each year; provided, that when such paving shall not be completed at such time by reason of inclement weather, or other good cause, and from no fault of the contractor, the common council may extend the time for its completion. (As amended by act approved June 24, 1887.)

SEC. 34. For the purpose of such assessment, the lots and parcels of real estate situated on said street, and fronting the portion thereof ordered to be improved, shall constitute one local assessment district, unless the common council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts. Such subdivision, if made, must be made before asking bids for the work; and in no case shall a city block be divided in making such division. The work for such local assessment district shall be bid for and let separately and such bidding and letting shall show:

First. That cost of all paving and grading, except that of the intersection of the cross-streets and alleys, the cost of the cross-walks at such intersections, and the cost of repaving;

Second. The cost of the grading and paving of each portion of the street included within the lines of intersection of any cross-street and alleys:

Third. The cost of the cross-walks at such intersections; provided, that in case where a side street merely opens upon and does not extend across the street to be paved, the space formed by extending the lines of the former street to the middle of the latter street shall, for the purposes of this act, be treated as the spaces formed by the intersection of cross-streets. All necessary platforms and curbings shall, for the purpose of such assessment, be deemed to be included within the term paving. (As amended by act approved June 24, 1887.)

SEC. 35. The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross-streets and alleys, and for the cross-walks at such intersections, and for repaving streets, avenues, and

highways shall be assessed ratably, according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district: provided, that if the assessment made on any such lot, or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the common council to be inequitable, said council may direct a just portion of such assessment to be paid from the general road fund. The cost of the work within the lines of the intersection of cross-streets, and also the cost of the cross-walks, shall be paid out of the general road fund. The cost of all repaving of streets, avenues and highways of the city shall be paid out of the repaving fund. The word "front," as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved. (As amended by act approved June 24, 1887.)

SEC. 36. Whenever in the improvements of a street as aforesaid, any land or real estate which has not been duly platted into city blocks or lots shall be required to be assesses to pay any part of the cost of such improvement, the council shall designate such part or parts thereof for such assessments as shall correspond as near as practicable to the portions of the block or blocks nearest adjacent thereto, subject to like assessment, and the part or parts so desig-dated shall be assessed as near as may be, in the manner herein provided for the assessment of lots.

SEC. 37. The board of assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, consti-
11 tuting a local assessment district, as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment-roll is thus completed, said board shall give notice, by at least five publications in the city paper, that such roll is completed, and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of such roll, sign the same and report it to the common council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections. And when the same shall be corrected to the satisfaction of said council it shall, by resolution, confirm the same. After such confirmation, such assessment shall constitute a lien, until paid, upon said lots or parcels of real estate, and shall be collected in such manner as may be authorized by law.

SEC. 44. The assessment-roll provided for in section thirty-seven of this chapter shall be made by the board of assessors in four parts, each part to contain a list of the lots or parcels mentioned in said section, with the names of the owners or occupants of each lot or

parcel, and one-quarter of the cost and expense of the work shall be assessed upon each lot or parcel. Such parts of the assessment-roll shall be numbered one, two, three and four, respectively.

12 3. That the common council of the city of Detroit, acting under the authority of the said charter, have enacted ordinances providing for the grading and paving and improvement of streets and making assessments for the expenses thereof and selling land for such assessments, which, so far as they are material to the controversy in this case, are as follows:

Revised Ordinances of the City of Detroit, 1895.

CHAPTER XXXII.

SEC. 1. Streets, or parts thereof, may be ordered to be graded and paved, by resolution of the common council, on motion of any member thereof, at a total cost to be expended in any one year not exceeding $200,000. (As amended December 30, 1889.)

SEC. 2. Streets, or parts thereof, may also be ordered to be graded and paved, by resolution of the common council, on petition of parties owning a majority of property fronting on the line of such street, or the part thereof proposed to be paved. Such primary petition shall pray generally that the street, or a specified part thereof, be graded and paved; and the preferences of the petitioners, or other parties interested, as to the kind of pavement they desire, may be shown by subsequent petition.

SEC. 3. When a street, or part thereof, is ordered to be graded and paved, the resolution shall declare generally that it is ordered that the street, within specified limits, be graded and paved, and shall direct what kind of pavement may be advertised for, and that for the purpose of assessment to defray the expense of such improvement, the lots and parcels of real estate situated upon such street, and fronting on the portion thereof ordered to be improved,

13 shall constitute a local assessment district; or two or more assessment districts may be thus established, of no less extent than one block each, in the discretion of the council.

SEC. 4. The city engineer, upon the passage of the resolution establishing a local assessment district, as provided in section 3 shall forthwith proceed to ascertain the quantities of work and material requisite to the improvement so ordered, and to estimate and apportion on the expense of advertising and blanks, and of inspection of the work during its progress, and shall make a report of the same in duplicate, over his signature, as near as conveniently may be, according to form "A" hereto attached, and deliver one to the assessor and one to the board of public works.

SEC. 5. It shall be the duty of the board of public works, as soon as they receive the report of the engineer, in section 4 above provided for, to proceed to advertise fifteen days, unless otherwise ordered by resolution of the common council, in the official city paper, for bids for the making — such improvements, with the kinds of pavements they shall have been directed to advertise for by the

council, and as required by the city charter. Such advertisement shall specify a time and place when and where such bids shall be opened; at which time and place such bids shall be opened by the board of public works, in the presence of such persons as shall choose to attend; and the board shall then report to the council all the bids received for each kind of pavement advertised for, designating the lowest responsible bidder. (As amended July 14, 1884.)

SEC. 6. Upon presentation of the report of the board of public works, in section 5 above provided, the common council may, by resolution, direct said board to contract with such of the lowest responsible bidders reported by the board, as it shall see fit; or direct further advertisement for the same, or different kinds of pavement, in its discretion; and then direct said board to contract with such lowest bidder, for such kind of pavement as is deemed expedient to adopt for the improvement.

SEC. 7. Upon the passage of the resolution in section 6 above provided, the board of public works shall forthwith proceed to enter into a contract with the party designated therein, and take sufficient security for its faithful performance. Such contract shall, among other things, provide, etc.

SEC. 8. It shall be the duty of the board of assessors immediately on receiving the report of the engineer, in section 4 of this ordinance provided for, forthwith to proceed and make a list of property in the local assessment district which shall have been established by the common council, according to section 3 of this ordinance, as required by section 37 of chapter 11 of the charter of the city of Detroit, and shall have such list in readiness to make the assessment required by said section 37 by the time the contract mentioned in section 7 of this ordinance shall have been confirmed by the council, and immediately upon such confirmation last mentioned, he shall compute the total cost of the improvement including expenses reported by the engineer, and proceed to make assessment of the same, and advertise and correct the assessment and report to the common council as in said section 37 of said amendments to the charter is required, and the common council shall proceed, as in said section 37 it is provided, to the confirmation of such assessment, and upon confirmation of such assessment-roll the city clerk shall deliver the same to the controller. (As amended June 7, 1893.)

SEC. 9. The controller, upon receipt of said assessment-roll in the last section provided, shall make the necessary entries in his books, as required by the charter and ordinances, and may retain the same in his office, in his discretion, until work under the contract which shall have been made is commenced; he shall at that time or at such time previous to the commencement of the work as he shall deem expedient, deliver such assessment-roll to the receiver of taxes; and thereafter, such proceedings shall be taken thereupon as are provided in the charter and ordinances for the collection of special assessments. (As amended December 30, 1889.)

Chapter XXXIII.

Sec. 1. Whenever the common council shall have resolved to pave any street or streets, the city officers shall proceed according to present ordinance, except as hereinafter provided. The city engineer shall add the estimated cost of blank bonds to his estimates assessable against lots fronting the improvement. The board of public works shall insert in their advertisements for proposals, notice, that contractors shall be paid in bonds or the proceeds thereof if such bonds are purchased by the sinking fund commissioners according to law, and shall insert provisions in the contracts for paving that contractors shall be thus paid. The assessors shall, in making assessments, proceed according to chapter 35 of the Revised Ordinances of the City of Detroit for the Year 1890, as amended, except that they shall make the assessment-rolls in four parts for each assessment district, according to section 4 of chapter 11 of the charter of the city of Detroit as amended by an act approved May 4th, 1893, and thereupon the controller shall procure blank bonds for the amount of such assessments, which bonds, after being duly executed in accordance with law, shall be delivered to the contractor
16 within thirty days after his completion of the pavement of the street according to specifications and its acceptance by the board of public works and the common council; provided, however, that the sinking fund commissioners shall have the privilege, if they shall so elect, to purchase said bonds for the sinking fund, in which case the proceeds for such sales to the amount of the said assessment shall be paid to said paving contractor. (As amended June 7, 1893.)

Sec. 2. Upon the receipt of the assessment-roll, as above provided, the receiver of taxes shall proceed to give notice by advertisement for five days in the official paper of the city that such roll is left with him for collection and that the assessments therein specified as part 1, may be paid to him at any time within thirty days after the first publication of such notice, without costs and without interest; that the assessments therein specified as parts 2, 3, and 4 may be paid to him at any time within sixty days after the first publication of said notice without cost, and without interest, and that the time to pay the assessments contained in either parts 2, 3 and 4 of such roll may be respectively extended as follows, viz: For the payment of the assessment in part 2, one year from the date of the first publication of such notice; that in part 3 two years, and that in part 4 three years from said date, upon payment of interest at 4 per cent. per annum on any of the said three parts of said assessment-roll in advance, for the respective periods above named at any time before the expiration of the said sixty days, and that after the expiration of the said thirty days for said part first, and said sixty days for said second, third and fourth parts as specified in such notice, the said unpaid assessments, excepting these upon which interest
17 shall have been prepaid according to the terms of such notice, and that said assessments upon which interest has been prepaid at the expiration of the time for which interest has been

paid, will be collected at once according to law, with five per cent. (5) penalty additional for costs of collection, and thereafter at the rate of one per cent. (1) per month for the first six months, and thereafter at the rate of seven per cent. (7) per annum from the date of said notice. (As amended June 7, 1893.)

SEC. 4. The receiver of taxes shall retain the several parts of said assessment-roll in his office for the times hereinafter stated, during which times he shall receive and credit thereon either principal or interest as the same shall be paid that is to say, he shall retain part 1 of said roll thirty days from the date of the receiver's notice, provided for in section 3 of this ordinance; he shall retain parts 2, 3 and 4 thereof sixty (60) days from said date; provided, that the parts 2, 3, and 4 upon which the interest has been prepaid as above provided he shall retain until the expiration of the time for which such interest has been paid. Said receiver shall, at the expiration of said sixty (60) days, notify the controller what portions of parts 2, 3 and 4 are unpaid. Said receiver shall proceed in the collection of parts 2, 3 and 4 as in the collection of part 1 and according to the provisions and requirements of other ordinances of the city relating to the collection of special assessments generally. And the proceeds of all collections upon said assessment-rolls, together with interest and fees thereon, shall be paid into the street-paving sinking fund hereinafter provided for. (As amended June 7, 1893.)

SEC. 5. A special sinking fund shall be created, to be de-
18 nominated the "Street-paving sinking fund" into which all moneys collected on said assessment-rolls shall be paid, and shall be credited to the street paved and assessed when paid in, and all bonds issued for the paving of said street shall be paid out of said fund and charged accordingly. (As amended June 7, 1893.)

SEC. 7. Any person having failed to pay the interest on parts 2, 3, and 4 in advance, as hereinbefore provided, may pay such interest at any time before a sale of the premises for such assessment, together with the costs and expenses of collection, if any, incurred on such assessment, also the interest thereon at the rate of one per cent. (1 per cent.) per month for the first six months from the date of the first publication of the notice provided for in section 3 and thereafter at the rate of seven per cent. (7 per cent.) per annum and such payment shall have the same effect as if paid in advance. (As amended June 7, 1893.)

CHAPTER XXXIII.

SEC. 1. Whenever any assessment-roll for any special assessment has been approved and confirmed by the common council, the same shall be deposited with the receiver of taxes, who shall retain the same in his office for the period of thirty days after the acceptance of the work for which said roll was made, or such further period of time as the common council shall, by resolution, direct, during which period the persons assessed may pay to said receiver the respective amounts of their assessments, without additional costs.

SEC. 2. At the expiration of the said period of time, as prescribed in section one (1), the receiver of taxes shall add five (5) per cent. to

every unpaid tax, and thereafter such tax shall bear ten (10) per cent. interest per annum until paid.

SEC. 5. Sales of any real or personal estate, for any unpaid assessment, shall be made in like manner, and with like effect, as in case of sales for the non-payment of the general tax.

CHAPTER XXVII.

SEC. 1. Whenever any general tax or assessment on any lands, tenements, hereditaments or premises in said city shall remain due and unpaid, after publication of notice by the receiver of taxes, as required by the provisions of section nine (9) chapter ten (10) of the charter, and after the expiration of the time therein mentioned, it shall be the duty of the receiver of taxes, on behalf of the common council, to proceed and sell such lands, tenements, hereditaments, and premises in the manner herein prescribed. (As amended July 14, 1884.)

SEC. 2. The receiver of taxes shall, on or before the first day of May, in each year, make out a list of all such lands, tenements, hereditaments or premises, the names, if known, of the owners or occupants of, or parties in interest, and the amount of the unpaid tax, or assessment due thereon, and shall, on behalf of the common council, cause to be published in the daily newspaper published by the printer for the city, once a week for four successive weeks, such list with a notice thereto attached, requiring the owners, or occupants of, or parties in interest in such lands, tenements, hereditaments or premises, to pay such assessment or tax; and further notifying them that if default be made in making such payment, any such real estate will be sold at public auction, at a day and place therein to be specified, for the lowest term of years at which any person will offer to take the same, in consideration of advancing and paying the sum assessed or taxed on the same, with the costs and charges in the premises, and shall, at the same time, cause said list, with said notice thereto attached, to be posted in three or more public places in each ward in said city. (As amended July 12, 1870.)

SEC. 3. If the owner, or owners, occupant or occupants, party or parties in interest, in any such real estate, do not pay any such assessment or tax, with the costs and charges thereon, within the period above prescribed for the publication of said notice, then the receiver of taxes, on behalf of the common council, at the place, and on the day mentioned in such notice, shall commence the sale of such lands, tenements, hereditaments and premises, at public auction and shall continue the same from day to day (Sundays excepted) until the same is sold for the lowest term of years at which any person shall offer to take the same, for the purpose, and in the manner already above expressed; but each lot, or parcel of lot, owned by any one person, or set of persons, against whom any such tax or assessment has been made, shall be sold by itself.

4. That he is and has been the owner and is now and has been since August 1st, 1893, in possession of lot one hundred and three

(103) of McLaughlin Bros.' subdivision of outlot four (4) and the southerly one hundred fifty (150) feet of outlot five (5) of the subdivision of quarter section forty-five (45) of the 10,000-acre tract, being situated in the city of Detroit, in said eastern district of Michigan, southern division, and that said lot and premises *is* of the value of about twelve thousand dollars ($12,000) and upwards, and has a rental value of eight hundred dollars ($800.00) per annum.

5. That on the 13th day of December, 1892, at a regular meeting held by the common council of the city of Detroit, the following resolution was introduced by Ald. Seeley, to wit:

"Resolved, That Woodward avenue be, and the same is hereby, ordered to be graded and paved from north curb line of
21 Pallister avenue to the center of Joy road, and that said avenue within said limits be paved with asphalt sixty (60) feet wide, Berea or Medina curbstone five (5) inches thick, and not less than six (6) feet wide, according to the specifications adopted by the common council and the estimates of the city engineer; and it is hereby declared that this action is had under that clause of the city charter authorizing the common council to annually enter into contracts for the grading, paving, etc., of streets, alleys, and public places upon petition of the holders of the larger portion of the real estate directly abutting upon the portions of the street or alley proposed to be improved.

"Resolved, That for the purpose of assessment for defraying and paying the cost of grading, paving, and curbing Woodward avenue from the north curb line of Pallister avenue to the center of Joy road, the lots and parcels of real estate situated on Woodward avenue embraced within said limits and forming the portion of said avenue ordered to be improved by said grading, paving, etc., shall be, and the same are hereby, constituted and declared to be one local assessment district.

"Resolved, That the city engineer be, and is hereby, ordered and directed to ascertain and report to both the city assessor and board of public works, according to the form and the ordinance in such case made and provided, the quantities of work and materials required for grading and paving said Woodward avenue within said limits, as follows:

"1. The quantity of all grading, paving, curbing, and other work on said Woodward avenue within said limits excepting the portions of said street constituting the intersections of cross-streets and alleys.

"2. The quantity of all grading, paving, and other work
22 of each portion of said Woodward avenue included and embraced within the lines of intersection of the cross-streets and alleys with said Woodward avenue.

"3. The quantity of all cross-walks at each intersection of said Woodward avenue with the cross-streets and alleys.

"Resolved, That as soon as the board shall receive the report of the city engineer showing the quantity of the grading, paving, curbing, cross-walks, material, and other work required, as above provided, on said Woodward avenue, said board shall, and is hereby, ordered

and directed to advertise five days for proposals for grading, paving, cross-walks, curbing and materials, and improving said Woodward avenue in accordance with the resolutions and proceedings above provided, and the provisions of the charter and ordinances of the city of Detroit."

Which resolution was laid upon the table.

6. That at a regular meeting of the common council of the city of Detroit, held on the 20th day of December, 1892, the following action was taken:

"Ald. Seeley moved to take from the table a resolution laid over December 13, 1892, ordering the paving of Woodward avenue from Pallister avenue to the Joy road; which motion prevailed. Ald. Vernor moved to insert 'brick on concrete, and cedar blocks on concrete;' which motion prevailed. The motion as amended was then adopted as follows: Yeas, 27; nays, none."

7. That the contract for paving said section of Woodward avenue from Pallister avenue to the Joy road was let to Otto E. C. Gulich for the sum of fifty-five thousand six hundred thirty-four dollars and seventy-eight cents ($55,634.78).

8. That an assessment-roll No. 246, for defraying the ex-
23 pense of grading said section of Woodward avenue from Pallister avenue to the Joy road, was made in four parts by the assessors of the city of Detroit, in accordance with the charter and ordinances of said city, except that no certificate of said assessors was attached to said roll, and on the ninth day of August, 1894, said roll was confirmed by the common council, and that said lot No. one hundred three (103) of McLaughlin Bros.' subdivision of outlot four (4) and the southerly one hundred fifty (150) feet of outlot five (5) of the subdivision of quarter section forty-five (45) of the 10,000-acre tract, being situated in the city of Detroit, in said eastern district of Michigan, southern division, was assessed on said roll for the aggregate sum of four hundred ninety-one dollars and forty-four cents ($491.44), a copy of which roll, so far as it effects said lot 103, together with a copy of the notice of review thereof and proof of publication of said notice, is hereto attached, marked "Exhibit 1," and is hereby made a part of this bill of complaint.

9. That the entire cost and expenses of paving said section of Woodward avenue from Pallister avenue to Joy road, amounting to $55,634.78, except the cost of paving the intersection of streets and alleys, *was* assessed upon the property abutting upon said Woodward avenue between Pallister avenue and Joy road, including said lot No. 103, *pro rata*, according to the frontage thereof on said Woodward avenue, without any regard to the benefits accruing to said several descriptions of property by reason of such grading and paving.

10. That on the 25th day of March, 1897, said lot 103 was sold for the taxes assessed thereon for the paving of Woodward avenue and
bid off to the city for ninety-nine years; that the time for
24 redemption from said sale has expired, and the title of the city thereto has become absolute, and that the said city of

Detroit now claims the title to and the right to possession of said lot under said sale for said period of ninety-nine years.

11. That on the 18th day of February, 1896, at a regular meeting held by the common council of the city of Detroit, the following communication was received from the board of public works in regard to paving Blaine avenue from Woodward avenue to Hamilton boulevard:

"To the honorable the common council.

GENTLEMEN: The board of public works, to whom was referred the petition of McLaughlin Bros. and others for the paving of Blaine avenue from Woodward avenue to Hamilton boulevard, respectfully report that the petitioners are the owners of the greater number of feet of real estate fronting on the street proposed to be improved.

"The board therefore recommends that the prayer of the petitioners be granted, and that Blaine avenue be paved within the limits stated with cedar blocks on concrete foundation, 26 feet wide; estimated cost, $11,440.00.

Respectfully submitted.

JACOB GUTHARD.
JOHN MVICAR.
D. W. H. MORELAND."

Which report was accepted.

12. That on the 18th day of February, 1896, at a regular meeting of the common council of the city of Detroit, the following resolution was introduced by Ald. Bleil:

"Resolved, That Blaine avenue be, and the same is hereby, ordered to be graded and paved from Woodward avenue to Hamilton boulevard, and that said avenue within said limits be paved with cedar blocks on concrete foundation 26 feet wide, according to the specifications adopted by the common council and the estimates of the city engineer; and it is hereby declared that this action is had under that clause of the city charter authorizing the common council to annually enter into contracts for the grading, paving, etc., of streets, alleys, and public places on the petition of the holders of the larger portion of the real estate directly abutting upon the portions of the street or alleys proposed to be improved.

"Resolved, That for the purpose of assessment for defraying, and paying the cost of grading, paving, and curbing Blaine avenue from Woodward avenue to the Hamilton boulevard the lots and parcels of real estate situated on said avenue embraced within said limits and fronting the portion of said avenue ordered to be improved by said grading, paving, etc., shall be, and the same are hereby, constituted and declared to be one local assessment district.

"Resolved, That the city engineer be, and is hereby, ordered and directed to ascertain and report to both the city assessor and board of public works, according to the form and the ordinance in such case made and provided, the quantities of work and materials re-

quired for grading and paving said avenue within the said limits as follows:

1. The quantity of all grading, paving, curbing, and other work on said avenue within said limits, excepting the said portion of said street constituting the intersections of cross-streets and alleys.

2. The quantity of all grading, paving, and other work of each portion of said avenue included and embraced within the
26 lines of intersection of the cross-streets and alleys with said avenue.

3. The quantity of all cross-walks at each intersection of said avenue with the cross-streets and alleys.

"Resolved, That as soon as the board shall receive the report of the city engineer, showing the quantity of the grading, paving, curbing, cross-walks, material, and other work required as above provided on said avenue, said board shall, and is hereby ordered and directed to, advertise for five times for proposals for grading, paving, cross-walks, curbing, and materials, and improving said avenue, in accordance with the resolutions and proceedings above provided and the provisions of the charter and ordinances of the city of Detroit."

Which resolution was adopted by the following votes: Yeas, 27; nays, none.

13. That the contract for paving said Blaine avenue from Woodward avenue to Hamilton boulevard was let to Patrick Dee for the sum of eleven thousand four hundred sixty-two dollars and thirty-two cents ($11,462.32).

14. That an assessment-roll, No. 363, for defraying the expense of grading and paving said Blaine avenue from Woodward avenue to Hamilton boulevard was made in four parts by the assessors of the city of Detroit, in accordance with the charter and ordinances of said city, and on the 5th day of May, 1894, said assessment-roll was confirmed by the common council of the city of Detroit, and that said lot No. 103 of McLaughlin Bros.' subdivision of outlot 4 and the southerly 150 feet of outlot 5 of subdivision of quarter section 45 of the 10,000-acre tract, in said city of Detroit, was assessed on said roll for the aggregate sum of four hundred forty-two dollars
27 and sixty-eight cents ($442.68), a copy of which roll, together with a copy of the certificate of the assessors and a copy of the notice of review of assessment and proof of publication of the same, so far as they effect the said lot 103, are hereto attached and marked "Exhibit 2," and are hereby made a part of this bill of complaint.

15. That the entire cost and expense of paving said Blaine avenue from Woodward avenue to Hamilton boulevard, amounting to eleven thousand four hundred sixty-two dollars and thirty-two cents ($11,462.32), except the cost of paving the intersection of streets and alleys, was assessed upon the property abutting on said Blaine avenue between Woodward avenue and Hamilton boulevard, including the said lot 103, *pro rata*, according to the frontage thereof on said Blaine avenue, and without any regard to the benefits accruing to

such several descriptions of property by reason of such grading and paving.

16. That said lots fronting on said Blaine avenue are not of uniform depth, said lot 103 being sixty-eight and $\frac{89}{100}$ (68.89) feet in depth, and all the other lots on said street being one hundred twenty-seven and $\frac{1}{2}$ ($127\frac{1}{2}$) feet in depth.

17. That on the 25th day of March, 1897, said lot was sold for the taxes assessed on part one of said roll for the paving of Blaine avenue, and bid off to the city of Detroit for ninety-nine years; that the time for redemption from said sale has expired, and the title of the city thereto has become absolute, and that the said city of Detroit now claims the title to and the right to possession of said lot under said sale for said period of ninety-nine years.

18. That on the 28th day of March, 1898, said lot was sold for the taxes assessed on part two of said roll for the paving of Blaine avenue, and bid off to the city of Detroit for ninety-nine years;
28 that the time for redemption from said sale has expired and the title of the city thereto has become absolute, and that the said city of Detroit now claims the title to and the right to possession of said lot under said sale for said period of ninety-nine years.

19. That on the 17th day of April, 1899, said lot was sold for the taxes assessed on part three of said roll for the paving of Blaine avenue, and bid off to the city of Detroit for ninety-nine years; that the time for redemption from said sale will expire on the 17th day of April, 1900.

20. That on the 19th day of March, 1900, said Thomas M. Lucking, receiver of taxes of said city of Detroit, gave notice that he would on the 16th day of April, A. D. 1900, sell said lot 103 for the taxes assessed on part four of said assessment-roll, which notice was published in the "Detroit Journal," a newspaper published in the city of Detroit, in said county of Wayne, on the 19th day of March, 1900. A copy of said advertisement, so far as it effects said lot 103, is hereto annexed and marked Exhibit "3."

21. Your orator further shows that the said several assessments and sales constitute a cloud upon the title of your orator to said lot 103.

22. Your orator further shows that the said charter of the city of Detroit and the ordinances enacted in pursuance thereof, which provide for the assessment of the entire cost and expense of the grading and paving of said streets upon the property abutting on the part of said streets so graded and paved, including your orator's said property, *pro rata*, according to the foot front, and making said assessment a lien on said property, and for the sale of the land for
29 such assessment, are in contravention of and violation of the rights of your orator under the fourteenth amendment of the Constitution of the United States in this, that they deprive your orator of property rights without due process of law.

23. Your orator further shows that the said charter and ordinances of the city of Detroit providing for the grading and paving of streets are in violation of the rights of your orator under the fourteenth amendment of the Constitution of the United States in

this, that they require the cost and expense of such grading a paving to be assessed upon the property abutting on the part of t street so graded and paved *pro rata*, according to the foot fro without any reference to the benefits accruing to such property reason of such grading and paving.

24. Your orator further shows that the said charter and or nances of the city of Detroit providing for the grading and pavi of streets are in violation of the rights of your orator under t fourteenth amendment to the Constitution of the United States this, that they do not provide for any hearing or review of asse ments at which the property-owner can show that his property not benefited to the amount of such assessment.

25. Your orator further shows that the several resolutions of th common council ordering said street to be graded and paved and th assessment to be made therefor are in violation of the rights of you orator under the fourteenth amendment to the Constitution of th United States in this, that they do not provide that such assessment shall be made according to the benefit to the property assessed but that the same shall be made arbitrarily, according t the foot front, as provided in said charter and ordinances.

26. Your orator further shows that by the said charter and ordi nances of the city of Detroit it is provided that the receiver of taxe and city treasurer shall enforce the lien created by and collect the assessment for grading and paving by selling the land therefor, an that any proceedings taken to sell your orator's said land for said several assessments will be taken by and under the charge and direction of said receiver of taxes and city treasurer and pursuant to the provisions of said charter and ordinances.

27. Your orator further shows that he is informed and believes and alleges the fact to be that the said city of Detroit claims the title to said lot 103 under and by virtue of said several sales for said assessments and is attempting to and intends, under the provisions of said charter and ordinances, to sell and convey to others its title to said lot 103, unless restrained therefrom by this honorable court.

28. Your orator further shows that said city of Detroit is advertising and intends to sell said lot 103 for part four of the assessment on said lot for the paving of said Blaine avenue, and will sell the same, as your orator alleges, unless restrained by this honorable court.

28½. Your orator further shows that the charter and ordinances of said city of Detroit require assessment-rolls for paving to be made out to the owner or occupant of the premises assessed, and that your orator was the owner and in open and notorious occupancy of said lot 103 at the time said Blaine avenue and Woodward avenue were paved, as aforesaid, and that said rolls were not made out to your orator as owner or occupant of said premises, but were assessed to one F. W. Dickinson, who has not now, nor ever had, any interest in and to said lot 103, nor any color of title thereto, and that the said assessments and sales of said lot 103 are in violation of said charter and ordinances and are void.

29. Your orator further alleges that the matter in dispute between

the parties in this suit exceeds the sum of ten thousand dollars ($10,000.00), exclusive of interest and costs, and arises under the Constitution of the United States.

31 30. Your orator further shows that the said City of Detroit is a municipal corporation, organized under said special charter granted by the legislature of this State, and that the said City of Detroit is a citizen of the State of Michigan and a resident of the eastern district, southern division thereof, and that Thomas M. Lucking is the receiver of taxes of the said city of Detroit and a citizen of the State of Michigan and a resident of the eastern district, southern division thereof; that William B. Thompson is the treasurer of said city of Detroit and a citizen of the State of Michigan and a resident of the eastern district, southern division thereof, and that your orator makes the said City of Detroit, Thomas M. Lucking, and William B. Thompson defendants to this his bill of complaint.

31. Your orator therefore prays that the said defendants, The City of Detroit, Thomas M. Luching, receiver of taxes of the city of Detroit, and William B. Thompson, treasurer of said city of Detroit, may, without oath (their answers under oath being hereby expressly waived), full, true, and perfect answer make to all and singular the matters herein contained and stated as fully and particularly as if the same were repeated and they were thereto distinctly interrogated.

32. That the said several sales of said land to the City of Detroit for said assessments and the title of said city under and by virtue of said sales may, by the order of this honorable court, be declared to be null and void and be set aside and the cloud created thereby upon the title of your orator to said lands may be removed, and that the said assessments of taxes on said land may be declared to be null and void and be set aside and the cloud created thereby upon the title of your orator to said land may be removed, and that the said City of Detroit and Thomas M. Lucking, receiver of taxes of said city of Detroit, and William B. Thompson, treasurer

32 of said city of Detroit, may, by an injunction issued out of and under the seal of this court, be perpetually restrained from selling and conveying or attempting to sell and convey said lot 103, hereinbefore described, and from advertising and selling or attempting to advertise and sell said lot 103 for said taxes assessed thereon, and that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience and as to the court shall seem meet.

33. And that in the meantime and until the further order of this court the said City of Detroit, Thomas M. Lucking, receiver of taxes of said city of Detroit, and William B. Thompson, treasurer of said city of Detroit, their agents and attorneys, and each and every of them, be restrained and enjoined as above prayed.

34. May it please the court to grant unto your orator the writ of subpœna, to be directed to the said City of Detroit, Thomas M. Lucking, receiver of the said city of Detroit, and William B. Thompson, treasurer of said city of Detroit, commanding them and each of

them, at a certain day and under a certain penalty therein to be specified, personally to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to and abide by such order and decree therein as to the court shall seem meet.

35. May it please the court to grant unto your orator the people's writ of injunction, to be directed to the said City of Detroit, Thomas M. Lucking, receiver of taxes of said city of Detroit, and William B. Thompson, treasurer of said city of Detroit, restraining and
33 enjoining them and each of them, and their solicitors, attorneys, counsellors, agents, and servants, from in any manner whatever selling and conveying, or attempting to sell and convey, said lot 103, and from in any manner attempting to collect said assessments from your orator; and your orator will ever pray, etc.

RALZEMOND A. PARKER,
Complainant.

BACON & YERKES,
Solicitors for Complainant.

Business address, 709, 710 Hammond building, Detroit, Michigan.

STATE OF MICHIGAN,
Eastern District of Michigan, County of Wayne, } ss:

On this 31st day of March, A. D. 1900, before me personally came the above-named Ralzemond A. Parker and made oath that he has read the foregoing bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.

ELLIOTT J. STODDARD,
Notary Public, Wayne County, Michigan.

34 EXHIBIT "1."

"Assessment-roll No. 246, for defraying the expense of grading and paving in paving assessment district No. 246, said district being that portion of Woodward avenue from the north curb line of Pallister avenue to the center line of Joy avenue, city of Detroit.

(Name) McLaughlin Bros.
(Lot) 103, McLaughlin Bros.' sub. of O. L. 4 and the s'ly 150 ft. of O. L. 5 of sub. of quarter sec. 45, 10,000-acre tract.
(Feet front) 68.89.

Part 1.

Cost of paving	$121.47
Cost of blanks	1.39
Total	$122.86

Part 2.

Cost of paving	$121.47
Cost of blanks, etc	1.39
Total	$122.86

Part 3.

Cost of paving	$121.47
Cost of blanks, etc	1.39
Total	$122.86

Part 4.

Cost of paving	$121.47
Cost of blanks, etc	1.39
Total	$122.86

OTTO E. C. GULICH, *Contractor.*
WM. T. DUST,
FRED E. FARNSWORTH,
J. C. McDONALD,
Board of Assessors."

Proof of Publication of Notice.

"BOARD OF ASSESSORS' OFFICE, DETROIT, *March* 22, 1893.

Paving notice No. 246.

Woodward avenue from Pallister avenue to Joy avenue.

To Edwin B. Robinson, —— Chandler, John Atkinson, R. S. Mason, J. F. Koch, McLaughlin Bros., Albert L. Stevens, Joseph Marshall, W. A. Carlson, Bela Hubbard, Henry A. Haigh, —— Petry, J. L. McLaughlin, J. C. Batchelder, Thomas Fraser, Mrs. Hattie Owen, Bartlett, Owen & Bartlett, Thomas & Wagner, Charles D. Standish, C. Carpenter, De Witt H. Taylor, Hunt & Leggett, M. M. Fisher, Thomas Calvert, John J. Dodds, Alfred Lucking, August Helbig, Anna M. Smith, —— Mack, William Darmstaetter, guardian; William Tait, J. H. Potts, Philip H Martz, August Klatt, Carl E. Schmidt, and to all other persons owning, occupying, or otherwise interested in any of the lots and premises fronting on Woodward avenue, in said city of Detroit, within the limits hereinafter mentioned:

The common council of the city of Detroit having ordered so much of Woodward avenue from the north curb line of Pallister avenue to the center line of Joy avenue to be graded and paved, notice is hereby given that an assessment has been made upon all the lots and premises fronting on said Woodward avenue and liable to be assessed for said improvement under the provisions of the city charter, and that a roll of said assessment is now completed and will

remain at the assessor's office, in the city of Detroit, from the date hereof until the 4th day of April next, for the inspection of all persons concerned therein.

WM. T. DUST,
President of the Board of Assessors.

STATE OF MICHIGAN, }
County of Wayne, } *ss:*

M. H. Garrells, being duly sworn, deposes and says the annexed printed copy of a notice was taken from the "Detroit Tribune," a newspaper printed and circulated in said county and State,
36 and that said notice was published in said newspaper on the 23rd, 24th, 25th, 27th, and 28th of March, A. D. '93; that he is the foreman of the printers of said newspaper and knows well the facts stated herein.

M. H. GARRELLS.

Subscribed and sworn to before me this 29th day of March, A. D. 189–.

JOHN A. RUSSELL,
Notary Public in and for said County.

37 EXHIBIT "2."

Assessment-roll No. 363, for defraying the expense of grading and paving Blaine avenue, in paving assessment district No. —, said district being constituted of the lots and parcels of real estate fronting that portion of said Blaine avenue from the west curb line of Woodward avenue to the east curb line of Hamilton boulevard, city of Detroit.

Lot 103, McLaughlin Bros.' sub. of O. L. 4 and the s'ly 150 ft. of O. L. 5 of sub. of quarter sec. 45, 10,000-acre tract.
(Feet front) 200.

Part 1.

Cost of paving	$108.13
Cost of blanks	2.54
Total	$110.67

Part 2.

Cost of paving	$108.13
Cost of blanks	2.54
Total	$110.67

Part 3.

Cost of paving	$108.13
Cost of blanks	2.54
Total	$110.67

Part 4.

Cost of paving	$108.13
Cost of blanks	2.54
Total	$110.67

(*Certificate Attached to Roll.*)

We hereby certify that this assessment-roll has been prepared pursuant to the resolution for the grading and paving of Blaine avenue from the west curb line of Woodward avenue to the east curb line of Hamilton boulevard, adopted by the common council
38 March 17th, 1896, and as required by the provisions of the charter and ordinances of the city of Detroit; that the same containes a list of lots and parcels of real estate constituting the local assessment district in said roll mentioned, with the names of the owners and occupants of each lot and parcel of real estate so far as we can ascertain the same, and also the length and front of each lot and parcel of real estate fronting directly on such improvement; that we have assessed the cost and expense of said work chargeable upon the property of said list ratably upon the several lots and parcels of real estate according to the length of front thereof.

We further certify that we have given the notice required by law that said roll was duly completed and would remain in our office for twelve days from the first publication of said notice for the inspection of all concerned, and that said roll has remained in our office for said period of twelve days from and after the first publication of said notice for such inspection, and that all needful revision and correction thereof has been made.

In witness whereof we have hereunto signed our names this 5th day of May, 1896.

WM. T. DUST,
FRED E. FARNSWORTH,
J. C. McDONALD,
Board of Assessors.

BOARD OF ASSESSORS' OFFICE, DETROIT, *April 21st*, 1896.

Paving Notice No. 363, Blaine Avenue.

To F. W. Dickinson *et al.* and all other persons owning, occupying, or otherwise interested in any of the lots and premises fronting on Blaine avenue, in said city of Detroit, within the limits hereinafter mentioned:

39 The common council of the city of Detroit having ordered so much of Blaine avenue from the west curb line of Woodward avenue to the east curb line of Hamilton boulevard to be graded and paved, notice is hereby given that an assessment has been made upon all the lots and premises fronting on said Blaine avenue and liable to be assessed for said improvement under the provisions of the city charter, and that a roll of said assessment is

now completed and will remain at the assessors' office, in the city of Detroit, from the date hereof until the 5th day of May next for the inspection of all persons concerned therein.

BOARD OF ASSESSORS,
By WM. T. DUST, *President.*

STATE OF MICHIGAN, }
County of Wayne, } *ss:*

Albert S. Harris, being duly sworn, deposes and says the annexed printed copy of a notice was taken from the "Detroit Tribune," a newspaper printed and circulated in said State and county, and that said notice was published in said newspaper on the 21st, 22nd, 23rd, 24th, and 25th days of April, 1896; that he is the foreman of the printers of said newspaper and knows well the facts stated herein.

ALBERT S. HARRIS.

Subscribed and sworn to before me this 25th day of April, 1896.

ISAAC M. BATES,
Notary Public in and for said County.

40 EXHIBIT "3."

Notice to Tax-payers.

Sale of lands for unpaid special assessments.

STATE OF MICHIGAN, }
City of Detroit. }

Notice is hereby given that pursuant to the law there will be sold at the office of the receiver of taxes, in the city hall, in the city of Detroit, State of Michigan, on Monday, the sixteenth day of April, A. D. 1900, at public auction, commencing at the hour of nine o'clock (local time) in the forenoon of said day, the several lands, tenements, hereditaments, and premises, as hereinafter described, each parcel or description separately, for the lowest term of years for which any person will offer to take the same in consideration of advancing the sum or sums which were assessed by the common council of said city and for the special purposes hereinafter set forth, unless the said sum or sums, with the costs and charges thereon, shall before that time be paid or satisfied which the owners, occupants of, or parties in interest therein in said lands, tenements, hereditaments, and premises against whom said sum or sums have been assessed are hereby required to do. Said sale will be continued from day to day (Sundays excepted) until the same are sold.

For Paving Streets—1896.

No. of roll—To whom assessed—Description of property.

Roll 363; for grading and paving Blaine Ave. from the west curb line of Woodward Ave. to the east curb line of Hamilton boulevard; F. W. Dickinson's Blaine Ave. lot 103, McLaughlin
41 Bros.' sub. of O. L. 4 and the s'ly 150 ft. of O. L. 5 of sub. of ¼ sec. 45, 10,000-acre tract:

Part 4.

Amount	$108.13
Charges	2.54
Interest	30.67
Collection fees	5.53
Advertising	.43
Total	$147.30

Detroit, March 19th, 1900.

THOS. M LUCKING,
Receiver of Taxes.

Filed in clerk's office April 6, 1900.
WALTER S. HARSHA, *Clerk.*

42 *Answer.*

Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

RALZEMOND A. PARKER, Complainant,
v.
THE CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and WILLIAM B. THOMPSON, Treasurer of the City of Detroit, Defendants. } No. 3666.

The answer of the above-named defendants to the complainant's bill of complaint in said cause.

These defendants, saving to themselves the benefits of the many imperfections in said bill of complaint and claiming the benefit of a demurrer thereto, for answer to said bill of complaint and to so much thereof as they are advised should be answered, say:

First. They admit the allegations contained in paragraphs 1, 3, 5 to 21, inclusive, and 26, 27, and 28.

Second. They admit that the city of Detroit was granted a charter by the legislature of the State of Michigan, as alleged in para-
43 graph 2 of said bill of complaint, and that all its general powers are defined in said charter, but they aver that said city possesses powers inherent to our form of government which cannot be taken away by the State and are not granted by it.

Third. They deny the conclusions of law asserted in paragraphs 22 and 23.

Fourth. They deny the conclusions of law in paragraphs 24 and 25, and also the facts as therein stated. They aver that the charter provides for notice to all tax-payers who are called upon to pay special assessments such as those mentioned in the bill of complaint, and that the complainant and all other persons interested in the assessment-rolls mentioned in complainant's bill of complaint received the notice provided for by law.

They further aver that although such notice was given the com-

plainant did not appear and complain of his assessment made in either of said assessment-rolls and in no way objected to it.

They aver further that said complainant had a right under the law to complain of the assessment if, for any reason, it was unjust or wrong, but that he took no steps whatever to inform the municipal authorities or any of them that he claimed said assessments to be unjust, nor did he make any attempt whatever to have them set aside or cancelled until the beginning of this suit.

These defendants further aver that said complainant's property was benefited by said improvements to an amount greater than the assessments against him or his said property shown by said assessment-rolls.

44 They aver further that the fact is that when a street is paved within said city the actual benefit to the property in the assessment district provided by law is always greater than the amount of the assessment made to defray the cost of such improvement.

Fourth. As to the allegations contained in paragraphs 4 and 29 these defendants have no knowledge, but leave the complainant to his proof thereof.

Fifth. As to paragraph 28½ contained in said bill of complaint, these defendants have no knowledge of the facts therein alleged, but aver that they are wholly immaterial under the law of Michigan, and, if true, afford no ground of relief, and they therefore claim the benefit of a demurrer to said paragraph.

Sixth. These defendants, further answering, say that said complainant, while said improvements were going forward, and knowing that the city of Detroit was incurring obligations which would have to be fulfilled, stood idly by and took no steps to protect his rights, if any he has, in the premises, and has stood silent for six years and upwards, and is therefore guilty of laches and is estopped from claiming relief in a court of equity.

Seventh. These defendants, further answering, say that the facts shown in this case are not such as to give this court jurisdiction in the premises, and they claim the benefit thereto the same as though they had interposed a plea to the jurisdiction of this court.

45 Wherefore, by reason of the foregoing, these defendants pray to be hence dismissed with their costs.

THE CITY OF DETROIT,
By CHARLES FLOWERS,
Corporation Counsel.
THOS. M LUCKING,
Receiver of Taxes.
W. B. THOMPSON, *Treasurer.*

Filed in clerk's office May 16, 1900.
WALTER S. HARSHA, *Clerk.*

46 *Order Entered Setting Case for Hearing at the June Term.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the sixteenth day of May, in the year one thousand nine hundred.

Present: The Honorable Henry H. Swan, district judge.

RALZEMOND A. PARKER *v.* CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes; William B. Thompson, City Treasurer.	In Equity. No. 3666.

By consent, this cause is hereby set for hearing at the June term, the day to be hereafter fixed by the court.

47 *Replication.*

Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

RALZEMOND A. PARKER *v.* THE CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes, and William B. Thompson, City Treasurer.	No. 3666.

The replication of Ralzemond A. Parker, complainant, to the answer of the City of Detroit, Thomas M. Lucking, receiver of taxes, and William B. Thompson, city treasurer, defendants.

This repliant, saving and reserving to *it*self all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendants is uncertain, untrue, and insufficient to be replied unto by said repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove,
48 as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

BACON & YERKES,
Solicitors for Complainant.

Filed in clerk's office May 26, 1900.

WALTER S. HARSHA, *Clerk.*

49 *Stipulation that Bill of Complaint be Amended.*

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

RALZEMOND A. PARKER
v.
THE CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and William B. Thompson, Treasurer of the City of Detroit. } No. 3666.

It is hereby stipulated and agreed by and between the parties hereto that paragraphs 10, 17, and 18 of said bill of complaint may be amended to read as follows:

"10. That on the 25th day of March, 1897, said lot 103 was sold for the taxes assessed thereon for the paving of Woodward avenue and bid off to the City of Detroit for ninety-nine years; that the time for redemption from said sale has expired and the said sale has become absolute, and the City of Detroit now claims the title to and the right to the possession of said lot under said sale for said period of ninety-nine years.

"17. That on the 25th day of March, 1897, said lot was sold for the taxes assessed on part one of said roll for the paving of Blaine avenue and bid off to the City of Detroit for ninety-nine years; that the time for redemption from said sale has expired and said sale has become absolute, and the said City of Detroit now claims the
50 title to and the right to the possession of said lot under said sale for said period of ninety-nine years.

"18. That on the 28th day of March, 1898, said lot was sold for the taxes assessed on part 2 of said roll for the paving of Blaine avenue, and bid off to the City of Detroit for ninety-nine years; that the time for redemption from said sale has expired, and said sale has become absolute, and said City of Detroit now claims the title to and the right to the possession of said lot under said sale for said period of ninety-nine years."

It is further stipulated and agreed that the answer of defendants to said bill of complaint shall stand as the answer to the amended bill of complaint.

BACON & YERKES,
Sol'rs for Complainant.
CHAS. FLOWERS,
Sol'rs for Defendants.

Filed in clerk's office June 20, 1900.
WALTER S. HARSHA, *Clerk.*

51 In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

RALZEMOND A. PARKER
v.
CITY OF DETROIT, THOMAS B. LUCKING, and WILLIAM B. Thompson. } No. 3666.

Testimony on behalf of the defendants, taken before Walter S. Harsha, United States commissioner, at his office, 306 P. O building, on Friday, June 22, 1900.

Appearances: Elbridge F. Bacon, Esq., of the firm of Bacon & Yerkes, for the complainant; C. D. Joslyn, Esq., assistant corporation counsel, for the defendants.

FRED E. FARNSWORTH, a witness produced on behalf of the defendants, being first duly sworn, in answer to interrogatories propounded to him by Mr. Joslyn, testified as follows:

1 Q. You are a resident of the city of Detroit?
A. Yes, sir.
2 Q. Born here?
A. Yes, sir.
3 Q. What is your age?
A. 47.
4 Q. You have been city assessor of the city of Detroit?
52 A. Yes, sir.
5 Q. From what period to what period?
A. From July 1, 1891, to November, '97.
6 Q. And what were your duties as city assessor?
A. The assessment of property, real and personal, in thec city of Detroit.
7 Q. You may state some of the methods by which you acquired general knowledge of property values.
A. Well, principally in going over the territory of the city assigned to an assessor each year—that is, to go through a street, up one side and down the other, taking in the class of property, improvements and property, from year to year.
8 Q. Keeping track of sales?
A. Yes; keeping track of sales and investigating sales.
9 Q. And mortgages?
A. Well, all those things are investigated to a certain extent by the office and kept track of.
10 Q. And also, I suppose, now and then by making inquiry of people in the vicinity of various properties?
A. Yes, sir.
11 Q. I suppose you took whatever means you could from time to time and what came under your observation to add to your general knowledge of values?
A. Yes, sir.
12 Q. Are you able to state, from your experience as city assessor

and examination of real-estate values in the city of Detroit, the general effect which paving a street has upon abutting property?

53 Objected to by counsel for complainant as immaterial and because there is not sufficient data in the question to enable him to give an intelligent answer to the question.

A. Yes, sir.

13 Q. What effect does it have?

Same objection.

A. It increases the value.

14 Q. Are you able to state generally whether the increase of value equals or exceeds the average cost of paving?

Objected to by counsel for complainant as incompetent and immaterial and for the further reason that the statute and charter under which the assessment is made for special improvements does not warrant any such investigation and the terms forbid it.

A. We always considered that, generally speaking, it did.

15 Q. Are you able to state whether or not it is the general custom among those dealing in real estate to increase the selling price of their property on a street after it has been paved?

Objected to by counsel for complainant as incompetent, immaterial, and irrelevant.

(15 Q. continued:) I am not asking as to individuals cases, but generally speaking.

54 A. Generally speaking, that is the impression. Of course, individual cases did come to my notice, and I had personal cases where they looked upon paving as an improvement, and the land values were increased thereby.

No cross-examination.

It is hereby conceded by counsel for defendants that the facts set forth in paragraph 4 of the bill of complaint are correct.

It is also conceded that Woodward avenue and Blain- avenue were public streets prior and at the time these taxes were levied.

It is also conceded that Woodward avenue is one of the original main trunk lines of the city of Detroit.

Counsel for defendants offers in evidence the assessment-rolls for the assessment of Woodward avenue, paving lot 103, and also the assessment-rolls for paving Blain- avenue.

The same is objected to by counsel for complainant.

Filed in clerk's office June 25, 1900.

WALTER S. HARSHA, *Clerk.*

55 *Motion for Preliminary Injunction Argued in Part.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Monday, the twenty-fifth day of June, in the year one thousand nine hundred.

Present: The Hon. Henry H. Swan, district judge.

RALZEMOND A. PARKER
v.
CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes; William B. Thompson, City Treasurer. } In Equity. No. 3666.

In this cause a motion for a preliminary injunction is argued by counsel in part.

56 *Motion for Preliminary Injunction Argued and Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Wednesday, the twenty-seventh day of June, in the year one thousand nine hundred.

Present: The Hon. Henry H. Swan, district judge.

RALZEMOND A. PARKER
v.
CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes; William B. Thompson, City Treasurer. } In Equity. No. 3666.

In this cause motion for preliminary injunction is further argued by counsel for respective parties and submitted.

57 *Final Decree.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Monday, the twenty-eighth day of July, in the year one thousand nine hundred.

Present: The Honorable Henry H. Swan, district judge.

RALZEMOND A. PARKER
v.
CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes; WILLIAM B. THOMPSON, City Treasurer. } In Equity. No. 3666.

This cause having come on to be heard on the bill of complaint filed therein, the answer of the defendants thereto, the replication of

the complainant to said answer, and upon proofs taken in
cause, and after hearing Elbridge F. Bacon, of the firm of Baco
Yerkes, solicitors for complainant, and R. A. Parker, in pro. per
in behalf of the complainant, and Charles Joslin in behalf of
defendants, and the court having given same due considerat
thereupon it is ordered, adjudged, and decreed as follows, viz:

1. That the complainant is and has been the owner and is
has been in actual possession of lot No. 103 of McLaugh
58 Bros'. subdivision of outlot four and the southerly one h
dred and fifty feet of outlot five of the subdivision of quar
section forty-five of the ten-thousand-acre tract, being situate in
city of Detroit, county of Wayne, and State of Michigan, as alleg
in his said bill of complaint.

2. That the City of Detroit claims title to a lien upon said lot
taxes assessed thereon for the paving of Woodward avenue a
Blaine avenue, as alleged in said bill of complaint.

3. That the taxes assessed on said lot No. 103 for the paving
Woodward avenue, and the sales of said lot to the city of Detroit
said taxes, and the title of said city acquired under and by virt
of said sales, be, and the same are hereby, set aside and declar
null and void as against the complainant, his heirs and assigns,
a cloud upon the title of the complainant, and that the said City
Detroit, Thomas M. Lucking, receiver of taxes for the city of D
troit, and William B. Thompson, treasurer of the said city of D
troit, and their and each of their successors in office, be, and a
hereby, perpetually enjoined and restrained from collecting or a
tempting to collect said assessments, and from selling and conve
ing or attempting to sell and convey said lot or any interest therei
and from advertising and selling or attempting to advertise and se
said lot or any interest therein for said taxes assessed thereon.

4. That the taxes assessed on said lot No. 103 for the paving
Blaine avenue, and the sales of said lot to the city of Detroi
59 for said taxes, and the title of said city acquired under an
by virtue of said sales, be, and the same are hereby, set asid
and declared null and void as against the complainant, his heirs an
assigns, as a cloud upon the title of the complainant, and that th
said City of Detroit, Thomas M. Lucking, receiver of taxes for the
city of Detroit, and William B. Thompson, treasurer of the said city
of Detroit, and their and each of their successors in office, be, and
they are hereby, perpetually enjoined and restrained from collecting
or attemping to collect said assessments, selling and conveying o
attempting to sell and convey said lot or any interest therein, and
from advertising and selling or attempting to advertise and sell said
lot or any interest therein for said taxes assessed thereon.

5. It is further ordered, adjudged, and decreed that the said com
plainant recover from said defendants the cost of his suit, and that
he have execution therefor.

60 In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

RALZEMOND A. PARKER, Complainant,
vs.
THE CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes, and WILLIAM B. THOMPSON, City Treasurer, Defendants.

Bacon & Yerkes, solicitors for complainant.
Charles D. Joslyn, ass't corporation counsel, for defendants.

SWAN, *J.*:

The bill in this cause was filed to set aside certain assessments and tax sales of complainant's land for the paving of Woodward and Blaine avenues, in the city of Detroit. It is conceded that the complainant is the owner of the property assessed, and is now and has been in actual possession of the same since August, 1893. The property consists of a house and lot on the corner of Woodward and Blaine avenues, with a frontage on Woodward avenue of 68.89 feet, and on Blaine avenue of 200 feet. The value of the premises is admitted to be $10,000 and upwards, and they have a rental value of $800 per year.

In December, 1892, proceedings were taken by the common council of Detroit for the paving of Woodward avenue, and in March, 1893, the contract was let for paving said avenue from Pallister avenue to the Joy road for the sum of $55,634.78. An assess-
61 ment-roll in four parts for the *for the* expense of the work of grading and paving was made by the assessors of the city of Detroit, and the property of complainant was assessed thereunder for the aggregate sum of $491.44. The entire cost and expense of paving Woodward avenue from Pallister avenue to the Joy road, except the cost of the paving of intersection of streets and alleys, was assessed on the property abutting on Woodward avenue between said streets *pro rata*, according to the frontage thereof on Woodward avenue. On the 25th day of March, 1897, complainant's property was sold for the taxes so assessed thereon, and was bid off to the City of Detroit for the term of ninety-nine years. Redemption from this sale expired March 25th, 1898. The City of Detroit now claims title to said lot under said sale for the said term of ninety-nine years.

In February, 1896, proceedings were taken to pave Blaine avenue from Woodward avenue to the Hamilton boulevard, and the paving was contracted for at the sum of $11,462.32; assessment-roll No. 363, for defraying the expense of making improvements and paving Blaine avenue, was made in four parts by the assessors of the city of Detroit. The amount assessed against the property of complainant on said lot for said paving was the sum of $442.68.

The entire cost and expense of paving Blaine avenue between Woodward avenue and Hamilton boulevard, except the cost of paving the intersection of streets and alleys, was assessed on the property abutting on Blaine avenue between the streets mentioned *pro rata*, according to the frontage thereof on Blaine avenue.

It appears from the proofs that complainant's lot has a
62 frontage of 88.89 feet on Woodward avenue and 200 feet on Blaine avenue, while the other lots on Blaine avenue assessed under said assessment-roll for said paving are 127½ feet in depth and have a frontage varying from forty to fifty feet.

On the 25th day of March, 1897, complainant's lot was sold for the taxes assessed on part 1 of the roll for paving Blaine avenue and bid*d* off to the City of Detroit for the term of ninety-nine years. On March 28th, 1898, the lot was sold for the taxes assessed on part two of the roll and bid off to the City of Detroit for a term of ninety-nine years. On the 19th day of April, 1899, the lot was sold for the taxes assessed on part three of said roll and bid off to the City of Detroit for the term of ninety-nine years. On the 16th day of April, 1900, the property was sold and bid off to the City of Detroit for the term of ninety-nine years.

On the first three sales of this lot for the paving of Blaine avenue the period of redemption has expired, and said sales have become absolute, and the city now claims title to said premises thereunder.

The provisions of the charter of the city of Detroit under which said paving was done and assessment and sales had are sections 33, 34, 35, and 43 of chap. 11 of the charter of the city of Detroit.

Without quoting these at length, it is sufficient to say that they authorize the common council to enter upon contracts for grading and paving and repaving its streets, and to cause to be assessed the expense of such work upon the lots and real estate made subject to such assessment, excepting the cost of repaving and cost of cross-
walks and work at the intersection of cross-streets; the lots
63 and parcels of real estate situate on the streets and fronting the portion ordered to be improved are declared to constitute one local assessment district, unless subdivided into two or more by the action of the common council; that the cost and expense of such improvement, except for that part of the line for intersection of cross-streets and alleys, and the cross-walks at such intersection, and for repaving streets, alleys, and highways, shall be assessed ratably, according to their extent of frontage on said lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district.

Provision is made for a modification in exceptional cases of the assessment, but this provision has no concern with any feature of this case. The charter definition of the word "front" is as follows:

SEC. 36. "The word 'front' as used in the act shall be construed to mean that part of a lot or property or parcel of land which directly abuts on that part of the street to be improved."

The board of assessors are required when necessary to make a list of all the lots or parcels of land constituting the local assessment district, with the name or owner of occupant on each, so far as can be ascertained, and the length of front of each lot or parcel fronting directly on such improvement, which board shall then assess the cost and expense of the work chargeable, as aforesaid, upon the property of said lots rateably upon the separate lots and parcels of

real estate according to the length of front thereof. When the assessment-roll is thus completed said board shall give notice by at least five publications in the city papers that such roll is completed and will remain in their office for twelve days from the first
64 publication of said notice for the inspection of all concerned. At the expiration of said twelve days said board shall, after any needful revision and correction of said roll, sign the same and report it to the common council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections; and when the same shall be correct to the satisfaction of said council, it shall confirm the same.

It will be seen from these sections of the charter that the common council is required to assess the entire cost of paving upon the property abutting on the street *pro rata* according to the foot front of such property, without any reference to the question of benefits. The only notice required to be given to the lot-owner is that required to be given by publication in the city newspaper, that the roll is completed and will remain in the office of the assessors for the inspection of all concerned. The charter provides no tribunal having any authority to reduce the assessments or to review the amount thereof, except for the purpose of ascertaining that the apportionment of the total expense among the lot-owners according to the foot front of their respective properties is mathematically correct—or, in other words, that his aliquot portion of the expense of the improvement has been correctly computed according to the frontage of his land upon the street improved.

No provision is made for any hearing as to the extent of the benefit, if any, to the property by the improvement, or whether such benefit equals the assessment made upon the respective parcels of property.

A restraining order was issued, and subsequently, upon notice, a hearing was had to the application for a perpetual injunction
65 restraining the city from attempting to enforce the taxes and assessments on which the sales of complainant's premises were based, and from claiming title thereto under said sales. At the same time of the motion for injunction the case came on for hearing upon pleadings and proofs.

It is the claim of complainant that the charter in the provisions mentioned that the entire cost of the street improvements, except for street and alley crossings, &c., shall be assessed against the abutting property by the fronting measurement without any regard to the special benefits received by the property or their relation to the cost of the improvement is in conflict with the 14th amendment of the Constitution of the United States and is null and void; that such legislation constitutes taking of property without just compensation and is a denial of equal protection of the law. The case of The Village of Norwood *vs.* Baker, U. S., 269, is the foundation for this position, and seems fully to sanction it. Since the decision of that case the question presented has been fully considered in the

following cases, among others, all holding that assessment-like that here complained of are in conflict with the Federal Constitution:

Hutcheson *vs.* Storrie, 92 Tex., 685;
Loeb *vs.* Trustees, 91 F. R., 37;
Fay *vs.* City of Springfield, 94 F. R., 409;
Charles *vs.* City of Marion, 98 F. R., 166;
Charles *vs.* City of Marion, 100 F. R., 361;
Lyon *vs.* Tonawanda, 98 F. R., 361;
Cowley *vs.* City of Spokane, 99 F. R., 840;

and has been so well discussed by Judges Baker, Cox, Thompson, Hanford, and Phillips as to leave little, if anything, to be said in support of their conclusions.

66 The supreme court of Michigan has declined to depart from its decisions sustaining the constitutionality of like statutes providing for assessments per foot front, on the ground that the ruling in Baker *vs.* Norwood must be confined to the facts of that case and have no application to an assessment for paving. With all respect for that learned tribunal, I am constrained under the cases cited to a different opinion of the decision and to follow the Supreme Court of the United States upon the construction of the 14th amendment of the Federal Constitution.

A decree therefore will be entered in accordance with the prayer of the bill and a perpetual injunction will issue as prayed.

Detroit, July 30th, 1900.

HENRY H. SWAN,
District Judge.

67 *Petition for and Order Allowing Appeal.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

RALZEMOND A. PARKER
v.
THE CITY OF DETROIT, THOMAS B. LUCKING, and WILLIAM B. THOMPSON. } No. 3666.

The above-named defendant, conceiving itself aggrieved by the final decree entered on the 28 of July, A. D. 1900, in the above-entitled cause, does hereby appeal from said decree to the Supreme Court of the United States, and it prays that this its appeal may be allowed, and that a transcript of the record, together with the assignments of error and proceedings and the papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated Detroit, this 30th day of July, in the year of our Lord nineteen hundred.

TIMOTHY E. TARSNEY,
Solicitor for Defendant and Appellant.

And now, to wit, on this 30th day of July, in the year of our Lord nineteen hundred, it is ordered that the appeal in the above-entitled cause be allowed as prayed for.

HENRY H. SWAN,
District Judge.

Filed in clerk's office July 30, 1900.
WALTER S. HARSHA, *Clerk.*

68 *Assignments of Error.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

RALZEMOND A. PARKER
v.
THE CITY OF DETROIT, THOMAS B. LUCKING, WILLIAM B. Thompson, Treasurer. } No. 3666.

And now comes the above-named defendant, by Timothy E. Tarsney, its solicitor, and says that the circuit judge who rendered the final decree herein erred in the following particulars, namely:

1. In holding and decreeing that the assessment of the special taxes sought to be enjoined in this suit is illegal, in that the charter of the city of Detroit does not provide adequate provisions for review by the persons assessed of the assessment-roll and the taxes assessed th-reon.

2. In holding and decreeing that said complainant did not have an opportunity to be heard upon appeal from the assessment-roll made upon complainant's lands and premises.

69 3. Said circuit judge erred in holding and decreeing that the taxes assessed upon complainant's lands were illegal, for the reason, as stated in said decree, that the assessment in said assessment-roll was void by reason of having been assessed upon complainant's property by the frontage thereof upon the streets paved.

4. Said circuit judge erred in holding and decreeing that the taxes assessed upon complainant's lands were illegal for the reasons as stated in said decree, that the assessment as made was not made according to benefits and advantages to each part and parcel of property therein assessed in proportion to the benefits derived by the making of the improvements on said streets.

5. Said circuit judge erred in refusing to hold and decree that said complainant was estopped from questioning the validity of the assessment made upon his said lots and property in the bill of complaint described, for the reason that said complainant had acquiesced therein, having knowledge that the defendant was performing the work of paving the street in front of his property and expending large sums of money thereon, he made no objection thereto.

6. Said circuit judge erred in refusing to hold and decree that said complainant could only complain and obtain relief in a court

of equity to the extent to which he could or did show that he would be injured by reason of said assessment, and in refusing to award to said defendant in said decree the sum or sums which it was found
said complainant's lands and premises had been benefited by
70 reason of the making of the improvements for which the taxes sought to be enjoined were levied and assessed.

7. Said circuit judge erred in decreeing that the defendant The City of Detroit should be restrained from enforcing the assessment made upon said complainant's lands and in holding said assessment void.

8. Said circuit judge erred in rendering the decree in favor of the complainant and against the defendant herein.

CITY OF DETROIT,
TIMOTHY E. TARSNEY,
Corporation Counsel, Solicitor for Defendant.

Filed in clerk's office July 30, 1900.
WALTER S. HARSHA, *Clerk.*

71 *Bond on Appeal.*

Know all men by these presents that we, The City of Detroit, as principal, and William B. Thompson and Timothy E. Tarsney, as sureties, all of Detroit, Michigan, are held and firmly bound unto Ralzemond A. Parker in the full sum of five hundred dollars, to be paid to the said Ralzemond A. Parker, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals this thirtieth day of July, in the year of our Lord nineteen hundred.

Whereas lately, at a session of the circuit court of the United States for the eastern district of Michigan, southern division, in equity, in a suit pending in said court between Ralzemond A. Parker and The City of Detroit, Thomas B. Lucking, and William B. Thompson, defendants, a final decree was entered against the said City of Detroit and Thomas B. Lucking and Wm. B. Thompson, and the said defendants, considering themselves ag-rieved by the said final decree, entered on the 30tl. day of July, 1900, have appealed from said decree to the Supreme Court of the United States, which said appeal has been duly allowed by the Hon. Henry H. Swan, judge of said circuit court, in equity, and a citation, directed to the said Ralzemond A. Parker, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof, has been duly issued and signed by the said judge:

72 Now, the condition of the above obligation is such that if the said City of Detroit and Thomas B. Lucking and Wm. B. Thompson shall prosecute said appeal to effect and answer all dam-

ages and costs *and* if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

THE CITY OF DETROIT, [L. S.]
By F. A. BLADES, *Controller.* [L. S.]
WM. B. THOMPSON. [L. S.]
TIMOTHY E. TARSNEY. [L. S.]

I hereby approve the foregoing bond.

HENRY H. SWAN,
District Judge.

Detroit, July 30, 1900.

Filed in clerk's office July 30, 1900.
WALTER S. HARSHA, *Clerk.*

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Ralzemond A. Parker, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, southern division, in equity, wherein Ralzemond A. Parker is complainant and appellee and the City of Detroit, Thomas B. Lucking, and William B. Thompson, treasurer, *is* defendant- and appellant-, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of July, in the year of our Lord nineteen hundred, and of the Independence of the United States the one hundred and twenty-fourth.

HENRY H. SWAN,
District Judge.

Attest: WALTER S. HARSHA, *Clerk.*

74 [Endorsed:] No. —. The United States circuit court eas. dis. of Mich., so. div., in equity. Ralzemond A. Parker, complainant, *vs.* City of Detroit *et al.*, defendant-. Citation. Timothy E. Tarsney, attorney for def., Majestic building. Filed in clerk's office July 30, 1900. Walter S. Harsha, clerk.

75 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

RALZEMOND A. PARKER
v.
THE CITY OF DETROIT ET AL. } No. 3666.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the claim of appeal of the above-named defendants that the above and foregoing is a true copy of the record and proceedings in said cause, together with the testimony; that I have compared the same with the original and it is a true and correct transcript therefrom and of the whole thereof.

Seal of the Circuit Court, Eastern District of Michigan.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 15th day of August, in the year one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fifth.

WALTER S. HARSHA, *Clerk.*

[Endorsed:] In the Supreme Court of the United States. The City of Detroit, Thomas B. Lucking, receiver of taxes; William B. Thompson, city treasurer, appellants, *v.* Ralzemond A. Parker, appellee. Return to claim of appeal.

Endorsed on cover: File No., 17,896. E. Michigan C. C. U. S. Term No., 411. The City of Detroit, Thomas B. Lucking, and William B. Thompson, appellants, *vs.* Ralzemond A. Parker. Filed September 4th, 1900.

Office Supreme Court
FILED
JAN 7 1901
JAMES H. McKENNEY,
Clerk

No. 411.

SUPREME COURT OF THE UNITED STATES.

Br. of Tarsney for P. E. Com'n

October Term, 1900.

Filed Jan. 7, 1901.

CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and WILLIAM B. THOMPSON, Treasurer of the City of Detroit,

Plaintiffs in Error,

vs.

RALZEMOND A. PARKER,

Defendant in Error.

411

MOTION TO ADVANCE AND BRIEF FOR PLAINTIFFS IN ERROR IN SUPPORT OF MOTION.

TIMOTHY E. TARSNEY,
Counsel for Plaintiffs in Error.

DETROIT:
THOS. SMITH PRESS.
1901.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and WILLIAM B. THOMPSON, Treasurer of the City of Detroit,
Plaintiffs in Error.

vs.

RALZEMOND A. PARKER,
Defendant in Error.

MOTION TO ADVANCE AND BRIEF FOR PLAINTIFFS in ERROR IN SUPPORT OF MOTION.

MOTION.

The plaintiffs in error come by Timothy E. Tarsney, their attorney, and respectfully ask that the above entitled cause may be advanced on the call and order of the docket, and the earliest practicable day assigned for its hearing, for the following reasons:

First. Because the cause, as shown by the record and the accompanying affidavit, is one of very great public interest and importance.

Second. For the special and peculiar circumstances set forth in this motion and the accompanying affidavit and abstract of record.

Third. Because upon the decision of the cause depends the right of every city and village in the State of Michigan

to assess for the grading and paving of streets under the provisions of their several charters and the general laws of the State of Michigan now in force.

Fourth. Because the Legislature of the State of Michigan commenced its biennial session on the 2nd day of January, 1901, and will in all probability adjourn on or about the 1st of July, 1901, and will hold no regular session until the first Wednesday of January, 1903; and it is very desirable that this cause should be heard, if possible, before the close of the present session of the Legislature, so that in case the judgment of the Circuit Court is affirmed the Legislature can take such action for relief of the City of Detroit and other municipalities as may be deemed necessary in view of such decision.

This motion is based upon the abstract of record, and affidavit of William B. Thompson, hereto attached.

TIMOTHY E. TARSNEY,
Attorney for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and WILLIAM B. THOMPSON, Treasurer of the City of Detroit,
Plaintiffs in Error.
vs.
RALZEMOND A. PARKER,
Defendant in Error.

STATE OF MICHIGAN,
EASTERN DIST. OF MICHIGAN, } ss.
COUNTY OF WAYNE.

WILLIAM B. THOMPSON, being duly sworn, deposes and says:

1. That he is Treasurer of the City of Detroit, and one of the plaintiffs in error in the above entitled cause, and makes this affidavit in behalf of all of the said plaintiffs in error.

2. That on the 28th day of July, A. D. 1900, the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, made a decree in the above entitled cause, setting aside the sale of the property described in the bill of complaint in said cause for the taxes assessed on said premises for paving Woodward and Blaine avenues, in the City of Detroit, and that said decree was made upon the ground that the charter of the City of Detroit providing for the assessment of taxes for paving streets upon the property abutting on the part of the street

paved, according to frontage, was in conflict with the Fourteenth Amendment to the Constitution of the United States, a true copy of which charter, so far as it relates to such assessment, is hereto attached, marked "A."

3. That the City of Detroit has now outstanding unpaid paving assessments which are affected by said decree, to the amount of four hundred and forty thousand dollars; that bonds of the City of Detroit have been issued in accordance with the provisions of the charter, payable from said assessments when collected, and are now outstanding to the amount of five hundred seventy-nine thousand and eighty-three dollars, which bonds have been bought and are now held by the Sinking Fund Commissioners of the City of Detroit, and said bonds now form part of the assets of said sinking fund.

4. That since the decision in this case the payment of assessments for paving has largely decreased in the City of Detroit, and, as deponent is informed and believes, such payments have also largely ceased in the cities and villages throughout the State of Michigan.

5. That deponent has caused investigation to be made, and is informed and verily believes, and alleges the fact to be, that the charters of all the cities and villages in the State of Michigan, as well as the general laws of the State of Michigan, contain a provision for assessing the cost of grading and paving streets upon the lands abutting on the part of the street paved, pro rata, according to the front foot, substantially the same as the provision contained in the charter of the City of Detroit, and that the decision in this case affects all the cities and villages in the State of Michigan.

6. That the Legislature of the State of Michigan commenced its biennial session on the 2nd day of January,

1901, and that such session will probably extend to about the 1st of July; that no other regular session of the Legislature will be held until the first Wednesday in January, 1903; and that it is very desirable that the above entitled cause, if possible, be heard and disposed of prior to the adjournment of the session of the Legislature, so that in case the decision of the Circuit Court is affirmed, the Legislature may take such action as may be necessary to provide a valid law for the assessment of paving taxes for the City of Detroit and the other cities and villages in the State, and take such action as may be necessary to relieve the City of Detroit and other municipalities from the effects of the decision in this case.

A true copy of Sec. 33, Art. IV., of the Constitution of the State of Michigan, providing for the sessions of the Legislature, is hereto attached, marked "B."

WM. B. THOMPSON.

Subscribed and sworn to before me this third day of January, A. D. 1901.

THOS. W. THOMPSON,
Notary Public, Wayne Co., Mich.

"A."

The charter of the City of Detroit, so far as it relates to assessments for paving streets, is as follows:

Chapter VII., Sec. 33: "The Common Council shall have power to make, grade, improve and adorn the public squares, spaces, grounds and parks belonging to or under the control of the corporation, and to control and regulate the same consistently with the purposes and objects thereof. It shall have power to establish, open, widen, extend, straighten, alter, vacate and abolish highways, streets, ave-

nues, lanes, alleys and public grounds or spaces within said city; and to grade, pave, repair and otherwise improve the highways, streets, avenues, lanes, alleys or interior public spaces created by the intersection of streets, crosswalks and sidewalks in said city, with stones, wood, brick or other material; and the Common Council shall have full power and authority to provide for the paying the costs and expenses thereof by assessment in such manner as shall be prescribed by law, which assessment hall be a lien, until paid, on the lot, lots or premises on which the same are bounded, and shall be collected in such manner as shall be authorized by law; * * *"

Chapter XI., Sec. 34: "For the purpose of such assessment, the lots and parcels of real estate situated on said street and fronting the portion thereof ordered to be improved shall constitute one local assessment district, unless the Common Council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts. Such subdivision, if made, must be done before asking bids for the work, and in no case shall a city block be divided in making such subdivision. * * *"

Sec. 35: "The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for the crosswalks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably, according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district; provided, that if the assessment made on any such lot, or other parcel of land, shall, by reason of its triangular or other irregular shape, seem to the Common Council to be inequitable, said council may direct a just portion of such assessment to be paid from the general

road fund. The cost of the work within the lines of the intersection of cross streets, and also the cost of the cross-walks, shall be paid out of the general road fund. The cost of all repaving of streets, avenues and highways of the city shall be paid out of the repaving fund. The word 'front' as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved."

Sec. 37: "The Board of Assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate constituting a local assessment district as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper, that such roll is completed and will remain in their office for twelve days from the first publication of said notice for the inspection of all concerned. At the expiration of said twelve days said board shall, after any needful revision and correction of such roll, sign the same and report it to the Common Council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections. And when the same shall be corrected to the satisfaction of said council, it shall, by resolution, confirm the same. After such confirmation, such assessment shall constitute a lien until paid upon said lots or parcels of real estate, and shall be collected in such manner as may be authorized by law."

"B."

Article IV., Sec. 33, of the Constitution of Michigan:

"The Legislature shall meet at the seat of government on the first Wednesday in January, in the year one thousand eight hundred sixty-one, and on the first Wednesday of January in every second year thereafter, and at no other time or place, unless as provided in the Constitution of the State, and shall adjourn without day at such time as the Legislature shall fix by concurrent resolution."

BRIEF.

Chapter XI., Secs. 34, 35 and 37, of the charter of the City of Detroit, provide that the entire cost and expense of grading and paving streets, excepting intersections of cross streets and alleys, shall be assessed upon the property abutting on the part of the street paved, pro rata, according to the foot front.

The property of defendant in error was assessed under this provision of the charter for paving Woodward and Blaine avenues. The assessments were not paid and the property was sold and bid off to the City of Detroit for ninety-nine years. The time for redemption from these sales has expired, and the sale has become absolute.

The bill was filed in this cause to set aside the tax assessments and vacate these sales and quiet the title to the property, on the ground that the provisions of the charter of the City of Detroit providing for the assessment of the entire cost of the paving according to the foot front on the property abutting on the street was in conflict with the

Fourteenth Amendment to the Constitution of the United States.

After a full hearing of the case a decree was rendered on the 28th day of July, 1900, by the Circuit Court of the United States for the Eastern District of Michigan, setting aside the assessments and vacating the sales for the reason that the provisions of the charter were in conflict with the Fourteenth Amendment to the Constitution of the United States, and therefore void.

There are assessments for paving now due to the City of Detroit, amounting to four hundred and forty thousand dollars, which are rendered invalid by this decision. Bonds have been issued by the city for the amount of these assessments, which have been bought and are now held by the Sinking Fund Commissioners of the City of Detroit as a part of the assets of that fund, and the effect of this decision is to invalidate all these taxes and bonds.

Nearly all the special charters held by cities in the State of Michigan, and the laws incorporating cities of the fourth class and villages, contain provisions for the assessment and collection of paving taxes according to the foot front, substantially the same as the provisions of the Detroit charter in question in this case.

Under Article IV., Section 32, of the Constitution of the State of Michigan, the Legislature holds biennial sessions on the first Wednesday in January in the years 1901 and 1903. The session of the Legislature for 1901 commenced on the 2nd day of January, and will continue until about the 1st of July, 1901, and there will be no other session of the Legislature after such adjournment until the first Wednesday in January, 1903, unless a special session is called.

If this court should affirm the decision of the Circuit Court of the United States for the Eastern District of Michigan, holding these provisions of the charter of the

City of Detroit unconstitutional, it would be necessary for the City of Detroit and the other cities and villages of the State to have their charters amended by the Legislature in order to make and collect assessments for the grading and paving of streets, and the case should be heard and decided, if possible, prior to the adjournment of the Legislature.

It clearly appears from the motion and accompanying papers, that unless this cause is advanced and decided during the present session of the Legislature, so that in case the decision of the court below should be affirmed, action might be taken by the Legislature to relieve the cities and villages from the consequences of the decision that the various municipalities would be greatly hindered and prevented from making improvements of streets for nearly two years.

Notice of this motion has been given to counsel for the opposite party, and we are advised by counsel for the defendant in error that he will join in this application.

We submit that in view of the public importance and interest of the questions involved in this case, the motion should be granted.

TIMOTHY E. TARSNEY,
Counsel for Plaintiffs in Error.

3073

No. 411.

Br. of Tarsney for Appellants

SUPREME COURT

OF THE UNITED STATES.

Filed Feb. 25, 1901.

OCTOBER TERM, 1900.

Office Supreme Court U. S.
FILED
FEB 25 1901
JAMES H. McKENNEY,
Clerk.

THE CITY OF DETROIT, THOMAS B. LUCKING, and WILLIAM B. THOMPSON, Appellants.

vs.

RALZEMOND A. PARKER, Appellee.

No. 411.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLANTS.

TIMOTHY E. TARSNEY,
Corporation Counsel.

DETROIT:
THE THOS. SMITH PRESS, 42-44 LARNED ST., W.
1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 411

THE CITY OF DETROIT,
THOMAS B. LUCKING and
WILLIAM B. THOMPSON,
Appellants,
vs.
RALZEMOND A. PARKER,
Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

BRIEF FOR APPELLANTS.

Appellee filed his bill in the Circuit Court of the United States for the Eastern District of Michigan, in Equity, praying therein that the city of Detroit and its officers be restrained and enjoined from selling and conveying, or attempting to sell and convey a certain lot, the property of the complainant, under and by virtue of certain proceedings had and taken by the city authorities in levying a special assessment for the paving of a street therein.

The provisions of the city charter under which the assessment, involved in this case, was made, are as follows:

CHAPTER XI.

"Sec. 33. Whenever the common council shall order any street, or any portion thereof, to be graded, or graded and

paved, or repaved, it may enter into contract for the making of such improvement according to the provisions of this charter, and after the cost and expense thereof has been ascertained, it shall cause the same, except the cost of repaving the cost of crosswalks, and of the work at the intersection of cross streets, to be assessed upon the lots and real estate herein made subject to such assessment as hereafter provided. In case of every contract for paving, the work to be performed thereunder shall be commenced and completed between the first day of May and the first day of November in each year; provided, that when such paving shall not be completed at such time, by reason of inclement weather, or other good cause, and from no fault of the contractor, the common council may extend the time for its completion. (As amended by act approved June 24, 1887.)

Sec. 34. For the purpose of such assessment, the lots and parcels of real estate situated on said street, and fronting the the portion thereof ordered to be improved, shall constitute one local assessment district, unless the common council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts. Such subdivision, if made, must be made before asking bids for the work; and in no case shall a city block be divided in making such division. The work for such local assessment district shall be bid for and let separately and such bidding and letting shall show:

First. The cost of all paving and grading, except that of the intersection of cross streets and alleys, the cost of the cross walks at such intersection, and the cost of repaving.

Second. The cost of the grading and paving of each portion of the street included within the lines of intersection of any cross street and alley.

Third. The cost of the cross walks at such intersections; provided, that in case where a side street merely opens upon and does not extend across the street to be paved, the space

formed by extending the lines of the former street to the middle of the latter street shall, for the purposes of this act, be treated as the spaces formed by the intersection of cross streets. All necessary platforms and curbings shall, for the purpose of such assessment, be deemed to be included within the term of paving. (As amended by act approved June 24, 1887.)

Sec. 35. The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for the cross walks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably, according to their extent or front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district; provided, that if the assessment made on any such lot or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the common council to be in equitable, said council may direct a just portion of such assessment to be paid from the general road fund. The cost of the work within the lines of the intersection of cross streets, and also the cost of the cross walks, shall be paid out of the general road fund. The cost of all repaving of streets, avenues and highways of the city shall be paid out of the repaving fund. The word "front," as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved. (As amended by act approved June 24, 1887.)

Sec. 36. Whenever in the improvements of a street as aforesaid, any land or real estate which has not been duly platted into city blocks or lots shall be required to be assessed to pay any part of the cost of such improvement, the council shall designate such part or parts thereof for such assessments as shall correspond as near as practicable to the portions of the block or blocks nearest adjacent thereto, subject to like assess-

ment, and the part or parts so designated shall be assessed as near as may be, in the manner herein provided for the assessment of lots.

Sec. 37. The board of assessors shall, when necessary, proceed to make out a list of all the lots or parcels or real estate, constituting a local assessment district as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid, upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper, that such roll is completed, and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of such roll, sign the same and report it to the common council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to the said board for further revision or corrections. And when the same shall be corrected to the satisfaction of said board it shall, by resolution, confirm the same. After such confirmation, such assessment roll shall constitute a lien, until paid, upon said lots or parcels of real estate, and shall be collected in such manner as may be authorized by law."

It will be observed that by section 34, the legislature of the State of Michigan had fixed and determined a local assessment district which shall bear the cost and expense of such improvement, except that part thereof which is directed to be paid at general city expense. "For the purpose of such assessment, the lots and parcels of real estate situated on said street, front-

ing the portion ordered to be improved shall constitute one local assessment district, unless the common council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts." The cost and expense of the improvement being ascertained, the board of assessors, by section 37, are required to "assess the cost and expense of the work chargeable as aforesaid upon the property in said list ratably upon the several lots and parcels of real estate according to the length of front thereof."

The complainant attacks the validity of the assessment in this case upon the supposition that it is violative of the rule adopted by majority of this Court, in Baker vs. Norwood, 176 U. S.

The opinion of this Court in Norwood vs. Baker has given rise to much controversy, and the extent to which the majority of the Court intended to apply the doctrine in that case seems to be very much misunderstood, and as a result thereof, we have had several and conflicting decisions rendered by courts in different parts of the country since that time.

The Federal Courts in Ohio, Indiana, Michigan, Missouri, New York and Washington, and the State Supreme Courts of Indiana, Massachusetts and Texas have held local assessments upon property immediately fronting upon the improvement as unwarranted, following the rule supposed to be laid down in the Norwood case.

Loeb vs. Trustees, 91 Fed. R., 37.
Fay vs. Springfield, 94 Fed. Rep., 409.
Charles vs. City of Marion, 98 Fed. R., 166.
Lyon vs. Tanawanda, 98 Fed. R., 361.
Cowley vs. Spokane, 99 Fed. Rep., 840.
Parker vs. Detroit, 103 Fed. R., 357.
Bidwell vs. Hough, 103 Fed. Rep., 363.
Hutchinson vs. Storey, 92 Texas, 688.
Sears vs. St. Com'r., 173 Mass., 350.
Adams vs. Shelbyville, 57 N. E., 114.
McKee vs. Pendleton, 57 id., 532.
Dexter vs. Boston, 57 N. E., 379.

Several of the State Supreme Courts have attempted to distinguish between the cases decided by them and the Norwood case, and in some instances, have not placed the broad construction upon the language of the opinion that the Federal Courts have placed thereon, and have upheld assessments based upon the frontage plan.

Webster vs. Fargo, 82 N. W., 732.
Wheeler vs. Dis. Court (Minn.), 83 N. W., 185.
Cass Farm Co. vs. Detroit, 83 N. W., 108.
Hemann vs. Allen, 57 S. W., 559.
Condag vs. Schnectady, 58 N. E., 130.
Hadley vs. DeBue, Cal., 62 Pac. R., 501.
Barbour Asphalt Paving Co., vs. Ess.

In view of the various methods adopted throughout the country, and the lack of uniformity in cities of the same State, in making local assessments, this real, or apparent, conflict of authority has created manifest uncertainty and confusion, and I confess that it has been no idle task to attempt to follow the train of reasoning of the numerous judges, and to arive at a conclusion which would either be acceptable to myself or to the Court. But it strikes me that the fundamental principle underlying this great question has been overlooked by many of the learned judges who have written thereon.

As we review the history of the country in relation to local assessments, we find that various plans have been adopted for defraying the expenses of what are termed local improvements. Whether such improvements consist of grading, paving, macadamizing streets, the construction of sewers, or an assessment for defraying the expense of condemnation of private property for public use, and sometimes other kinds of local improvements. In some instances, we find assessment by valuation, some by area, some by frontage, and some upon the theory that the property within affixed district is benefited by the improvements. Notwithstanding the fact that such improvements are local in

their character, they are, nevertheless, public improvements, provided for by the machinery of a public law and the authority to provide means for defraying the expenses of such improvements, likewise comes from the public, namely, the law-making power of the State.

While a distinction is drawn between taxation and local assessments, it should not be forgotten that local assessments is a species of taxation, and the authority to make them comes from the same source, namely, the legislative department of the State.

As expressed by Judge Dillon: "Courts are very generally agreed that the authority to require property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * * Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting property, orother property specially benefited, and if, in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to the frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency, unless there is some special restraining constitutional provision upon the subject."

Dillon, Section 754, 4th Ed.

Hence it is, that in the exercise of the taxing power, where not restrained by constitutional limitations, the legislatures of the various States have adopted, or authorized different methods of defraying the expenses of such improvements, and such different methods have been sustained by the highest courts in the land.

Assessments by value on area have been sustained in the following cases:

Gilmore vs. Hentig, 33 Kan., 156.
Lockwood vs. St. Louis, 24 Mo., 20.
Keese vs. Denver, 10 Col., 112.
Burnett vs. Mayor, 12 Cal., 76.
Maderia Irrigation District, 92 Cal., 296-324.
Crayton vs. Scott, 14 O. St., 438.
Daly vs. Swope, 47 Miss., 367.
Wallace vs. Shelton, 14 L. Ann., 498.
Wright vs. Boston, 9 Cush., 233.
Downer vs. Boston, 7 id., 277.
Snow vs. Fitchburg, 136 Mass., 183.
Strowbridge vs. Portland, 8 Or., 67.
Bishop vs. Tripp, R. I., 8 Atl., 692.
Richmond, etc., R. Co., vs. Lynchburg, 81 Va., 473.
Cooley, Taxation, 648-9.
Walston vs. Nevin, 128 U. S., 578.
Hager vs. Reclamation Dis., 111 U. S., 701.

Again, legislation which directs that all the expense of the improvements be collected out of the abutting property is sustained by the courts:

Parkersburg vs. Travenor, 26 S. E., 179.
Lent vs. Tillson, 72 Cal., 404.
Dorgan vs. Boston, 12 Allen, 223.
St. vs. Fuller, 34 N. J. L., 227.
Spencer vs. Merchant, 125 U. S., 345.
Bowman vs. Ross, 167 U. S., 548.

The front foot rule has also been upheld by numerous authorities.

Judge Cooley, in speaking of assessments by front foot, says: "In many instances where streets were to be opened, or improved, sewers constructed, water pipes laid, or other improve-

ments entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement, in a degree bearing some proporton to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits, and making that standard, to apportion the benefits accordingly. Such a measure of apportionment seems, at first blush to be perfectly arbitrary and likely to operate in some cases with great injustice, but it cannot be denied that in the case of some improvements frontage is a very reasonable measure of benefits, much more so, than value could be, and perhaps approaching equality as nearly as any estimate of benefits, made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment." Citing.

Pennock vs. Hoover Rawle, 291.
McGonigle vs. Alleghany City, 44 Penn. St., 118.
McGee vs. Commonwealth, 46 id., 308.
Sprung Garden vs. Wistar, 18 id., 195.
Stroud vs. Philadelphia, 61 id., 255.
Covington vs. Boyle, 6 Bush, 234.
State vs. Elizabeth, 30 N. J., 365.
Same vs. Same, 31 N. J., 547.
State vs. Fuller, 34 id., 227.
Ernst vs. Kunkle, 5 O. St., 520.
Upington vs. Oviatt, 24 id., 232.
Barnes vs. Hutchison, 2 Kan., 455.
Parker vs. Challis, 9 id., 155.
St. Joseph vs. Anthiny, 20 Mo., 537.
Fowler vs. St. Joseph, 37 id., 228.
Nennan vs. Smith, 50 id., 525.
Chambers vs. Satterlee, 40 Cal., 497.
Palmer vs. Stumpf, 29 Ind., 329.

Cooley Taxation, p. 451, to which may be added:

Davis vs. Lynchburg, 6 S. E., 230.
Raleigh vs. Pierce, 14 S. E., 521.
Norfolk vs. Ellis, 26 Grat., 224.

Mayor vs. John Hopkins Hospital, 56 Md., 1.
Maale vs. Mayor, 61 Md., 224.
Rutherford vs. Hamilton, 11 S. W., 249.
Chamberlain vs. Cleveland, 34 O. St., 551.
Palmer vs. Stumpf, 29 Ind., 329.
Seeley vs. Pittsburg, 82 Penn. St., 300.
Hamilton vs. Philadelphia, 65 Pa. St., 146.
In re Washington Avenue, 69 Pa. St., 352.
Harrisburg vs. McCormick, 129 Pa. St., 213.
McKeesport vs. Bush, 31 Atl., 49.

It is settled law in Michigan that it is competent for the legislature to authorize the cost of local improvements upon the abutting property according to frontage. It is true, the rule was not adopted with the full concurrence of the early bench.

Williams vs. Mayor of Detroit, 2 Mich., 560.
Woodbridge vs. Detroit, 8 Mich., 274.
Motz vs. Detroit, 18 Mich., 495, but the later cases of:
Sheley vs. Detroit, 45 Mich., 431.
Kalamazoo vs. Francoise, 115 Mich., 554.
Cass Farm Co., vs. Detroit, 83 N. W., 108.

settle the rule in this State? Judge Cooley, in the Sheley case, said: "If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy."

The power of the legislature to determine the percentage of the cost of the work, to be raised by local assessment, was sustained in Norfolk vs. Ellis, 26 Grat., 224; Hilliard vs. Comm'r, 24 S. E., 738; Parkersburg vs. Travenor, 26 S. E., 179; Bowman vs. Ross, 167 U. S., 548.

The legislature has itself bound a specfic tax upon each acre of land within a district created by itself:

Egyptian Land Co. vs. Horden, 27 Mo., 495.
Williams vs. Carmmock, 27 Miss., 209.
Alcorn vs. Hainer, 38 Miss., 652.

and has authorized such tax to be levied by the district (Wallace vs. Shelton, 14 La. Ann., 503), and has authorized a present uniform rate for each sewer upon the estimated cost of all sewers within the district.

Leominster vs. Conant, 193 Mass., 384.

Authorities are not wanting which hold that the element of benefits is not the controlling factor in the validity of a local assessment, but that assessments may be sustained without reference to such benefits.

McTruddy vs. Smith, 67Mo. App., 205.
Warren vs. Henley, 31 Iowa, 31.
Dewey vs. Demoine, 70 N. W., 605.
Michener vs. Philadelphia, 118 Penn St., 535.
Harrisburg vs. McCormick, 129 Pa. St., 213.

In Iowa, it is held that local assessments are not based on benefits, but on the simple ground that the object is public, and that the system of taxing abutting lots secures such a just and fair disposition of the burden as to be within the rule requiring uniform taxation. Warren vs. Henley, 31 Io., 31: ——— vs. Heeshire, 32 Io., 271.

In Wisconsin, the theory of benefits is denied, and the power to impose such burdens placed upon the constitutional recognition of the power to make assessments, as distinguished from taxation.

Weeks vs. Milwaukee, 102 Wis., 242.

In Lent vs. Tillson, 72 Cal., Sec. 428, Mr. Justice Temple said: "The main practical difference between assessments for a local improvement and general taxation seems to be that in in general taxation, it is difficult and generally impossible for the Court to say that the purpose of the tax is not a public purpose and that no benefit will result to the taxpayer; while in local assessments it is more easy to say that the improvement will not be a special benefit. Still *the benefit is not the source of the power;* that is inherent in the government, and is only limited by express or implied limitations found in the constitution, or by its own nature, perhaps. Within these limitations, the legislature is the sole judge of when, and to what extent the power shall be used."

Cooley on Taxation, p. 622: "The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confined to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere."

In re Madeira Irrigation District, supra, the Court said: "It is not necessary to show that the property within the district may be actually benefited by the local improvement, and even if it positively appear that no benefit is received, such property is not thereby exempt from bearing its portion of the assessment, nor is the act in the constitution, because it provides that such property shall be assessed."

Indeed it cannot be said that an assessment of the cost of a public improvement by area, by valuation, by legislative determination of the percentage of the cost to be raised by local assessment, or from the abutting property, or by the front foot rule necessarily takes into consideration the question of benefits, or at least of the whole benefit, which the property assessed derives from the making of such improvement.

I conclude, therefore, that we must look further than the mere method adopted to defray the expenses of such improve-

ments, and ascertain, if possible, upon what principle the legislative authority to make such assessments is exercised.

It must be borne in mind that the legislature of a State possesses absolute power and authority to legislate in relation to all matters of purely State or local concern, in accordance with its own judgment of policy, except so far as such legislature may be restrained by constitutional limitations. I speak now of constitutional limilitations contained in the constitution of the State.

The only provision in the constitution of Michigan bearing upon the subject of taxation is section 11, article 14: "The legislature shall provide an uniform rule of taxation, except on property paying specific taxes; and taxes shall be levied on such property as shall be prescribed by law." Section 12: "All assessments hereafter authorized shall be on property at its cash value." These provisions are held to apply to taxation proper, but not to local assessments, except in so far that the rule of uniformity must be observed within the limits of the special taxing district. These provisions of the State Constitution requiring the uniform rate of taxation and cash valuation in the assessment of property have no application to local assessments for local improvements, such as grading and paving of a street, but relate only to the valuation of property and its taxation for general purposes.

Mott vs. Detroit, 18 Mich., 444.
Woodbridge vs. Detroit, 8 Mich., 274.
Hoyt vs. E. Saginaw, 18 Mich., 39.

Therefore, the legislature of Michigan is at liberty to adopt such measure as it may choose in defraying the expense of local improvements; and local assesments being a species of taxation, and the power to tax being a sovereign power, any method adopted by the legislature may be upheld: the benefit equiva-

lent, and the burden is not necessarily an element to their validity.

I am aware that it has frequently been said that all citizens derive a benefit from the government as an equivalent for the taxesimposed upon them, but thisview is more chimerical than real. Blackwell on Tax Titles, page 1, defines tax as "Burdens of charges imposed by the legislative power of the State upon persons or property, to raise money for public purposes." Mr. Justice Field, in Perry vs. Washburn, 29 Cal., 318, gives substantially the same definition. Judge Kingman, in People vs. McCree, in 34 Cal., 34, said "tax is a charge levied by the sovereign power upon its subjects. Judge Agnew, in Hillvish vs. Catterman, 64 Pa. St., 154, asks, "What are taxes but the revenue collected from the people for objects in which they are interested?"

Judge Cooley, adopting the opinion of Judges in 58 Me., 591, says taxes are defined as being an enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government, and for all public needs; they are the property of the citizen, demanded and received by the government to be disposed of to enable it to carry into effect its mandate and discharge its manifold functions. * * * * The power of taxation is an incident to sovereign authority, and is co-extensive with that of which it is an incident; all subjects, therefore over which the sovereign power of the State extends are, in its discretion, legitimate subjects of taxation, and this may be carried to any extent which the government may choose to carry it." Citing Chief Justice Marshall, in McCollough vs. Maryland, 4 Wheaton, 428, 429; Providence Bank vs. Billings, 4 Pet., 514; Charles River Bridge vs. Warren Bridge, 11 Pet., 420; Nathan vs. Louisiana, 8 Howard, 73; People vs. Brooklyn, 4 N. Y., 419. "In its very nature, it acknowledges no limits, and the only security against abuse must be found in the responsibility of the legislature which

imposes the tax to the constituency who are to pay it. The judiciary can afford no redress against oppressive taxation, so long as the legislature in imposing it shall keep within the limits of legislative authority."

Cooley, page 1-4.

Mr. Justice Ruggles, in People vs. Brooklyn: "Nor has the State Constitution ordained or forbidden that the taxes shall be apportioned according to benefit which each taxpayer is supposed to receive from the object on which the tax is expended. In all these particulars, the power of taxation is unrestrained." 4 N. Y., 319.

The general purposes of taxation are: First, defense of the commonwealth; second, the administration of justice; third, the expense of public works and instruction; and fourth, the expense of supporting the dignity of the State.

Mr. Justice Gray, speaking for this Court, in Spencer vs. Merchant, 125 U. S., 348, said: "That power of taxation is unlimited, except that it must be exercised for public purposes."

The fact that the exercise of the sovereign power of the State, exercised through the functions of its legislative department, for the purpose of raising revenue or funds to meet some public demand, is the sole and only power and legitimate reason for the imposition of any tax, has frequently been overlooked by many of the learned judges, and by a process of reasoning which it is difficult to understand, have sought to weave into the general doctrine of taxation the theories that taxes are apportioned in proportion to the benefits or advantages in some inscrutable and undefined manner received by the person or property upon which such tax is imposed.

While it is undoubtedly true that in many instances benefits in some form or another may follow, not the imposition, but

the expenditure of moneys received by taxation, and as a result thereof, it by no means follows that such resultant advantages is a necessary incident to the exercise of the power of taxation, nor is it true that in all cases the property or persons taxed are benefited by the imposition of such tax.

I am not aware of any rule which requires the doctrine of equivalents, or measure for measure, or that we must give as much as we take, necessarily involved in the power of taxation; for persons and things are taxed for which it is difficult to find wherein they receive any return. I take it that it would be quite difficult to convince a bachelor, who may be a large taxpayer, that he is benefited to any considerable extent by the payment of a school tax, or an heir that he has derived any considerable advantage from the imposition of a five per cent tax upon his inheritance; or an importer or consumer of imported goods, of the advantage to him of governmental duty in the increased cost thereby. While lands may be increased in value by reason of the expenditure of public moneys, in the improvement of highways, yet taxes levied and assessed upon personal property have the effect of decreasing instead of enhancing its value. Instance: Two stocks of goods, one in a locality where personal property may be exempt from all taxation, or where the tax rate is lower than in another locality. Personal property is of greater value to the extent to which it is relieved from the burden of taxation.

I conclude, then, that benefits are not a necessary equivalent of taxation, and that those learned judges who have endeavored to weave this intangible and inscrutable theory have confused the principles of eminent domain with the power of taxation. In eminent domain, where the public sequesters private property for public use, constitutional requirements as well as a sense of justice demand that equivalents shall be paid for that which is taken.

"A tax exacts money or service from individuals for their

respective shares or contribution to some public burden. Private property taken for public use by the right of eminent domain is taken, not as the owner's share or contribution to the public burden, but as so much beyond his share. Special compensation is, therefore, to be made in the latter case, because the government is a debtor for the property so taken, but not in the former, because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax."

Cooley on Taxation, 624

Wherein, then, lies the distinction, if any, in principle, between taxation and local assessment? Both alike are for public purposes. Taxing districts are established for the purpose of apportioning upon such districts such taxes as the legislature, in its wisdom and discretion, sees fit to impose for a public purpose. For State purposes the entire State is one taxing district; counties, towns, cities, villages, school districts, and road districts are each severally constituted for the purposes for which such subdivisions are created. Undoubtedly it would be within the power of the legislature of the State to provide that all highway taxes should be assessed as a State tax, and distributed among the various localities according to legislative discretion, and for the purpose of more equal distribution that the moneys raised in a particular locality for highway purposes shall be expended in such locality, but the legislature has seen fit to adopt a system of local taxing districts, and to impose upon each township, city and village a duty of keeping the highways within their respective limits in a reasonably safe and fit condition for public traffic. For that purpose they have empowered such municipalities to levy a local tax; so each locality or community becomes a taxing district. Inside these, again, in the country districts, we find another subdivision, known as road districts, under the particular charge of a pathmaster, or over-

eer of highways. Usually one mile, more or less, is within he jurisdiction of such overseer. Taxes are imposed in such oad districts, differing in amount in the different districts in he same town; and such taxes may be paid by labor, or by urnishing implements for the improvement of the highway. nd yet such highways are common to all the inhabitants of the tate. So that, in this instance, we find a work that is general nd common to the entire State imposed upon a small subdivis- on thereof, and the task of the construction and keeping in epair is imposed upon the few.

Instance: A highway traversing the entire State; upon it are several cities. The inter-urban highway is kept in ondition by the localities or road districts through which it ns. Within the limits of a city, where travel is more con- sted, and a greater use is made of the highway, the public quirements demand that such highway within the limits of ch city shall be kept in better condition that in the country. nce, the public demands that such highway, within the limits f the city, shall be paved with cobblestones, asphalt, wood, or her kind of pavement.

The legislature here determines that a new taxing district is eper, for the purpose of the maintenance of such highway ithin the limits of the city, either for the paving or re-paving ereof, and it determines that the property fronting upon such ghway, upon either side thereof, shall constitute a separate ad district, and that the cost of the maintenance shall be appor- ned upon the property within such taxing district. What is is but an extension of the system of subdividing the State to local taxing districts? And how does the purpose of such s become changed by reason of the method by which such portionment is made? Whether by valuation, by area, by ot front, or in accordance with the benefits which each parcel y be deemed to receive from the making of such improve-

ment. Surely, if the legislature has the power to spread an ad valorem tax in the country, it may do so in the city; if it has the power to apportion a tax according to benefits in a city, why has it not the same power in the country? What letter or spirit of the State constitution is violated, because the legislature, in its wisdom, chooses to adopt one course rather than the other?

Suppose that the legislature of Michigan should see fit to enlarge these local taxing districts, and subdivided the city into as many road districts as there are wards, and to make each road district so constituted a taxing district for the purpose of maintaining the pavements within the limits of such district; or suppose it should further extend such district, and say that the entire city shall bear all the expense of maintaining the streets by a general tax assessed upon all the property in the city. What constitutional provision is violated thereby? I answer, none. It resolves itself into a question of legislative policy, with which the courts have no concern, except to see that the proceedings are properly conducted, and rights are protected in the carrying out of such policy.

II.

As was said by this Court in County of Mobile vs. Kimball, 102 U. S., "When any municipal work is authorized, it rests with the legislature, unless restricted by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It might apportion the burden ratably among all the counties, or other particular subdivisions of the State, nor the wholly or greater share of the whole, upon that county, or portion of the State especially and immediately benefited by the expenditure."

The whole subject of taxation belongs to the legislature,

The authority may be exercised directly, or in the case of local assessment or tax, it may be left to local boards or bodies. It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error of judgment regarding special benefits, and defeated by satisfying a court that no special, pecuniary benefit was received. If the legislature has fixed the district and laid the tax for the reason that in the opinion of the legislative body such district is pecuniarly benefited, its action must, in general, be deemed conclusive.

Baltimore vs. Hughes, 1 Gill & J., 480
Litchfield vs. Vernon, 41 N. Y., 123
People vs. Lawrence, 41 N. Y., 140
Philadelphia vs. Field, 58 Pa. St., 320
McCon vs. Pattee, 57 Miss., 378
Kelly vs. Cleveland, 34 O. St., 468
Bigelow vs. Chicago, 90 Ill., 40
Cooley Taxation, 640

This rule was approved by this Court in Spencer vs. Merchant, 125 U. S., 343: "Where an assessment for the expense of regulating, grading and repairing a street for travel was laid upon the lands lying within 300 feet of each side, which, in the judgment of the commissioners, would be benefited by the improvement." Where this, and other objections were urged, Mr. Justice Gray said: "Each of these things was within the power of the legislature, whose action cannot be reviewed by the Court upon the ground that it acted unjustly or without appropriate and adequate reason." Citing, with approval, Litchfield vs. Vernon, 40 N. Y., 123; People vs. Brooklyn, 4 N. Y., 427; People vs. Flagg, 46 N. Y., 405; Horn vs. New Lots, 83 N. Y., 100; Cooley on Taxation, 450. "The legislature may commit the ascertainment of the sum to be raised, and of the benefited district to commissioners, but it is not bound to do so,

and may settle both questions for itself, and when it does, its action is necessarily conclusive and beyond review."

So that, in the case we are considering, the legislature provided by Section 34 of Chapter 11, of the charter of Detroit: "For the purpose of such assessment, the lots and parcels of real estate, situated on said street and fronting the portion thereof ordered to be improved, shall constitute one local assessment district, unless the common council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts." By Section 35: "The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for the cross walks at such intersections, and for repaving streets and avenues, shall be assessed ratably, according to the extent of front on the lots, parts of lots, or parcels of real estate, directly fronting on and within the local assessment district."

This, then, was the legislative determination, not only of the district, but of the apportionment of cost upon such district, and the view of this Court in Spencer vs. Merchant; Walston vs. Nevin, 128 U. S., 578; Williams vs. Eggleston, 170 U. S., 304; Parsons vs. Dis. of Columbia, 170 U. S., 45, is not open to review.

I have not overlooked the fact that many of these cases hold that the fixing of the assessment districts, and the apportionment of the cost is a legislative determination that the property within such district has been benefited, and that such determination is conclusive upon the Court. Indeed, if we are to consider that the question of benefits and advantage is a controlling factor in this class of assessments, then some tribunal must make such determination. True, the legislature may, and perhaps generally does, empower some local body like a common council or board of commissioners to prescribe the limits of the special taxing district, and to apportion the cost upon such

district. If the legislature can authorize a local body to do so, it may do itself that which it can authorize others to do; for it is difficult to imagine that a creature can possess greater powers than its creator. But whether the legislature, itself, prescribes the limits of the district, or delegates this authority to some other body, it is nevertheless the exercise of a legislative function, and I cannot comprehend how the courts can interfere with such legislative details, without judicial encroachment upon the domain of the legislature.

State laws imposing upon property, according to legislative discretion, the cost of local improvements, do not deprive the owner of his property, without due process of law, within the meaning of the 14th amendment.

In Davison vs. Administrators New Orleans, 96 U. S., 97: The State of Louisiana passed an act providing for the drainage of certain territory, established an assessment district, and apportioned the cost of such drainage upon the property within such district. This was assailed as being in violation of the constitutional provision that no State should deprive any person of life, liberty or property, without due process of law.

Mr. Justice Miller, in delivering the opinion of the Court, said: "Whenever by the laws of a State, or by State authority, a tax assessment, servitude or other burthen is imposed upon property for the public use, whether it be of the whole State or of some limited portion of the community, and those laws provide for the mode of confirming and testing the charge thus imposed, in the ordinary courts of justice with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * * It is said that part of the property

of the plaintiff assessed is not benefited by this improvement, but this is a matter of detail with which this Court cannot interfere."

The County of Mobile vs. Kimball, 102 U. S., 691 (238). In 1867, the legislature of Alabama created a board of commissioners for the improvement of the harbor, river and bay of Mobile, and provided that the expense thereof should be borne by the county of Mobile. It was urged against this legislation that the work was a benefit to the whole State, and objection was raised to the act for that reason. But the Court said:

"Assuming this to be so, it is no objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restricted by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It might apportion the burthen ratably among all the counties, or other particular subdivisions of the State, or the whole or greater share of the whole upon that county, or apportion the State specially and immediately benefited by the expenditure. It may be that the act, in imposing upon the county of Mobile the entire burthen of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would be more just to the people of the county if the legislature had apportioned the expense of the improvement which was a benefit to the whole State among the different counties, but this Court is not the harbor in which the people of a city or county can find refuge from ill-advised, unequal and oppressive legislation. The judicial power of the federal government can only be invoked when some right under the constitution, laws or treaties of the United States is invaded. In all other cases, the only remedy of the evils of the people which rests with the people must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation as far as practicable, and be more mindful than their predecessors of the public interest."

Hager vs. Reclamation District, No. 108; 111 U. S., 701 (569). By an act of the legislature of California, passed in 1868, a general system was established for reclaiming swamp and overflowed salt, marsh and tide lands in the State. It provided for the foundation of reclamation districts to be established by the board of supervisors of the county in which the lands, or the greater part of them, were situated. The supervisors were then to appoint three commissioners to jointly view and assess upon each acre to be reclaimed or benefited, a tax, proportionate to the whole expense and to the benefits which will result from the work. The Court, in passing upon the objections to the validity of this act, said:

"The expense of such works may be charged against the parties specially benefited and be made a lien upon their property; all that is required in such cases is that the charges shall be apportioned in some just and reasonable mode according to the benefit received. Absolute equality in imposing, however, may not be reached, only an approximation to it may be attainable; if no direct and invidious discrimination in favor of certain persons, to the prejudice of others be made, it is not a valid objection to the mode pursued that to some extent inequalities may arise. It may possibly be that in some portions of the country there are overflowed lands of so large and extent that the expense of their reclamation should properly be borne by the State. But this is a matter purely of legislative discretion. *Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its costs shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure.* Citing Mobile vs. Kimball, 102 U. S., 704. The rule of equality and uniformity prescribed in cases of taxation for State and county purposes, does not require that all property or all persons in the county or district shall be taxed for local purposes."

It will be borne in mind that the Court here was considering the provisions of a statute which provided in terms for an assessment in proportion to benefits. The advantage which they derived from the drainage and the language used must have reference to that system of imposition of the taxes, but it recognizes the principle contended for here; that it is for the State Legislature to determine upon what territory the burden of an assessment for improvements shall be spread.

Spencer vs. Merchant, 125 U. S., 345 (31763). An assessment for the expense of regulating, grading and preparing a street for travel was laid upon the lands lying within 300 feet of each side, which, in the judgment of the commissioners, would be benefited by the improvement. The original assessment was set aside because the statute provided no means by which the owners might have notice or an opportunity to be heard in regard to the assessment for grading and preparing the street for travel. Subsequently, the legislature directed a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expense of making that assessment and interest since, to be levied and equitably apportioned by the supervisors upon and among those lots, after public notice to all parties interested to appear and be heard upon the question. The said portion of that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff in this action.

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised and the property to be assessed and upon which it is to be apportioned."

Mr. Justice Gray, in the opinion, said that "Each of these things was within the power of the legislature, whose action cannot be review in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. Citing, with approval, Litchfield vs. Vernon, 44 N. Y., 123; People

vs. Brooklyn, 4 N. Y., 427; People vs. Flagg, 46 N. Y., 405; Horn vs. New Lots, 83 N. Y., 100; Cooley on Taxation, 450. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the expense and cost, with interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In doing so, it necessarily determines two things, namely, the amount to be realized, and the property specially benefited by the expenditure of that amount. *The lands might have been benefited, and so the legislature determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust is not open to our review.* The question of special benefit, and the property to which it extends is, of necessity, a question of fact, and when the legislature determines it in a case within its general power, its decision must, of course, be final. We can see in the determination reached possible sources of error, and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature properly determined that the lands described in the act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense, and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot, for that reason, question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public

purposes. Citing, Weisner vs. Douglas, 64 N. Y., 91. Certainly, if the acts of '69 and '70 had never been passed, but the improvement of Atlantic avenue had been ordered, the legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically just that was done in this case. * * * The legislature, in the exercise of its power, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading and repairing of a street, to be assessed upon the owners of lands benefited thereby, and the determination of the territorial district which should be taxed for local improvement is within the province of legislative discretion. * * * * In the absence of any more specfic constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the such necessary to be levied for the expense of a public improvement and order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which should receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both these facts to the judgment of commissioners.

Walston vs. Nevin, 128 U. S., 578 (5441), was error to the Court of Appeals of Kentucky to review a judgment directing the enforcement of a lien for an assessment for a local improvement in the city of Louisville. The act under which the proceeding was taken provided that, "When the improvement is the original construction of any street, road, lane, or alley, or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the Central council according to the number of square feet owned by them respectively, except that corner lots

* * * shall pay 25 per cent more than others for such improvement. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square."

"Section 4. When an improvement in public ways shall have been made * * * and the contract therefor completed, the city engineer shall, by one insertion in one of the daily newspapers published in Louisville, give notice of the time and place fixed for the inspection and reception of the work by the city engineer or either of his assistants or deputies, and such owners or their agents and representatives may appear and be heard before such engineer or his assistant or deputy, as to whether such improvement shall have been made in accordance with the ordinance authorizing the same and the contract therefor."

It will be observed that no provision was made for a hearing upon the question of the necessity of the improvement, the taxing district or the extent of the tax to be raised and levied upon the different parcels.

In this case the Court follows Davidson vs. New Orleans, 96 U. S., 104, and in commenting thereon, Mr. Justice Fuller says: "And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the lands assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards benefits conferred, nor that personal judgment was rendered to the amount assessed, are matters in which the State authorities are controlled by the Federal Constitution. Here the determination of the taxing district and the manner of the apportionment are all within legislative power." Citing, Spencer vs. Merchant, 125 U. S., 345 (31763); Stanley vs. Albany, 121 U. S., 550; Mobile vs. Kimball, 102 U. S., 691; Hager vs. Reclamation District, 111 U. S., 701; United States vs. Memphis, 97 U. S., 284; Laramee County vs. Albany

County, 92 U. S., 397. Whenever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied. Wertz vs. Hoagland, 114 U. S., 606; Richmond F. & P. R. R. Co. vs. Richmond, 96 U. S., 529. The remedy for abuse is in State Courts, for in the language of Mr. Justice Field, in Mobile vs. Kimball, "This Court is not the harbor in which the people of a State can find refuge from ill-advised, unequal and oppressive State legislation."

The objection urged by the complainant that no opportunity is afforded for a review or hearing upon the assessment is not well taken. The objection is based upon the provision in Section 37 of the charter of the city of Detroit: "When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper that such roll is completed and will remain in their office for twelve days from the first publication of said notice for the inspection of all concerned; after the expiration of said twelve days, said board shall, after any needful revision and correction of said roll, sign the same and report it to the common council."

I really concede that a right of hearing should be granted in all cases where the apportionment of the tax involves the exercise of judgment or a determination upon some question of fact, as, for instance, valuation, or the extent of benefits, where a tax is assessed upon such a theory, or where life or liberty is involved; but that rule does not obtain where the assessment involves only a mathematical calculation, as where a fixed sum is to be apportioned, and levied according to a fixed rule; for a hearing in such case would not avail the party, for no alteration could be made. This view is sustained by numerous authorities: Cleveland vs. Tripp, 13 R. I., 60; Amery vs. Keokuk, 72 Io., 704; Galette vs. Denver, 21 Fed., 824, both holding notice unnecessary when assessment is determined by mere mathematical computation; Reclamation District vs. Phillips, 108 Cal., 314, holding no notice or hearing required where

legislature has apportioned tax; Commonwealth vs. Lehigh R. R. Co., 12 Pa. St., 456, holding tax on corporation loans valid without hearing; Maderia Irrigation District, 14 L. R. A., 755 (Cal.).

In Hager vs. Reclamation District, No. 110, 111 U. S., 701, it was contended that inasmuch as no notice was provided for or given that the act was void, and that the taking of property thereunder did not constitute due process of law. The Court said:

"Undoubtedly, where life and liberty are involved, due process requires that there be a course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley in his concurring opinion in Davidson vs. New Orleans: 'In judging what is due process of law, respect must be had to the cause and the object of the taking, whether under the taxing power, the power of eminent domain, the power of assessment for local improvements, or some of these, and if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law. The power of taxation possessed by the State may be exercised upon any subject within the jurisdiction of the State, and to any extent not prohibited by the Constitution of the United States. As said by this Court: "It may touch property in every shape, in its natural condition, in its manufactured

form and in its various transmutations and the amount of the taxation may be determined by the value of the property or its use or its capacity or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures and in transportation. Unless restrained by the provisions of the federal constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." State Tax on Foreign Bonds, 15 Wal., 319.

Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things or persons or occupations. In such cases, the legislature in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore violated. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel or gallon, there is nothing the owner can do which can effect the amount to be collected from him. So if a person wishes a license to a business of a particular kind, or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by law and go into business. There is no need in such case for a notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in a State, or on domestic corporations for franchises, if the parties desire the

privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property not specifically but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the States provision is made for the correction of errors committed by them."

In Spencer vs. Merchant, supra, it was complained that the act did not give the land owners an opportunity to be heard as to the original apportionment, although it did give them an opportunity to raise all pertinent and available questions, and dispute their liability as to its amount and extent. The court, in speaking of this objection, said: "That objection becomes a criticism upon the action of the legislature, and the process by which it determined the amount to be raised, and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines the expenditures and the amounts to be raised for their payment, the whole discussion and all questions of prudence, propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power, when it fixed, first the amount to be raised to discharge the improvement debt incurred by its direction; second, when it designated the lots and property which, in its judgment, by reason of special benefits, should bear the burden."

Again, "When the determination of lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited, and how much, but the legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are, in fact, benefited, and if it does so,

its determination is conclusive upon the owners, and the courts and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited, the legislature may avail itself of such information as it deems sufficient, either through investigation by its committees or by adopting as its own, the estimates or conclusions of others whether those estimates or conclusions previously had or had not any legal sanction."

I do not understand that there was in this case any specific declaration by the legislature that the lots within the assessment district were specially benefited. Mr. Justice Gray said that the legislature practically determined that the lands described in that act were peculiarly benefited, and I infer that this practical determination was involved in the designation of the lands which should be assessed. In other words, that the legislature had in view the idea of benefits in fixing assessment districts, without expressly so declaring.

In Williams vs. Eggleston, 170 U. S., 304, Mr. Justice Brewer, speaking for the Court, said: "Neither can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing, it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is, in fact, benefited."

In this case a portion of the cost of the purchase of a toll

bridge over the Connecticut River at the city of Hartford was apportioned among five towns, designated by the legislature.

Parsons vs. District of Columbia, 170 U. S., 45, was a proceeding to test the legality of a special assessment made against the plaintiff's land for a water main tax or assessment, for laying a water main in the street, on which petitioner's land abuts. The act of the Legislative Assembly of the District of Columbia, June 23, 1873, provided that "hereafter in order to defray the expense of laying water mains and the erection of fire plugs, there be and is hereby levied a special tax of 1¼ cents per square foot on every lot or part of lot which binds in or touches on any avenue, street or alley in which a main water pipe may hereafter be laid, and fire plug erected." By act of Congress, August 11, 1894, it was provided that hereafter all assessments levied for laying water mains in the District of Columbia shall be at the rate of $1.25 per linear front foot, against all lots or land abutting upon a street, road or alley in which a water main shall be laid." 28 St. at L., 275.

Mr. Justice Shiras delivered the opinion of the Court and held: "By this legislation a comprehensive system, regulating the supply of water and the erection and maintenance of reservoirs and of water mains was established and of this legislation every property owner in the District must be presumed to have notice. And accordingly when by the act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear foot against all lots or lands abutting upon the street, road or alley in which a watermain was laid, such act must be deemed conclusive alike of the question of the necessity of the work and *of the benefits as against abutting property*. To open such questions for review on the petition of every or any property holder would create endless confusion. Where the legislature has submitted these questions for inquiry to a commis-

sion or official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice, or an opportunity to be heard."

Here, again, the court seems to treat the designation by Congress of the particular property to be assessed as implying a finding and determination of the benefits as against abutting property.

IV.

He who seeks equity, must do equity.

The complainant asks a court of equity to relieve him from payment of an assessment made upon his property for the paving of a street, in front thereof; not because such assessment is unjust; not because it is excessive; not because complainant conceives or alleges himself to have been injured thereby, but solely upon the ground that the proceedings had and taken have not been in accordance with law. He does not offer in his bill to pay any sum which the court may find that he equitably ought to pay. He has stood by and seen this work proceed, the expenditure of money which must necessarily result in some benefit to him, and such work and expenditure having been made in reliance upon the supposed regularity of the proceedings looking to the assessment, he remained silent, and not until after the completion of the work, when all possible advantages accrued to him, do we hear him complain.

I have not understood the majority opinion in the Norwood case to extend any further than to treat an assessment void as to the excess thereof, over the benefits or advantages received by the property assessed, and I think that in cases of this class the complainant should be required to offer, in his bill, to pay any sum which the court might find to be deemed equitable and just, before asking relief of a court of equity.

The Supreme Court of Michigan has repeatedly held that the owner of land, who sits by when improvements are being made, under statutory authority, knowing that the only method of compensating those who perform the labor is by an assessment, cannot after the benefits have been reaped, resort to a court of equity for redress.

Byram vs. Detroit, 50 Mich., 56.
Twist vs. City of Port Huron, 63 Mich., 528.
Lundbon vs. City of Manistee, 93 Mich., 170.
Goodwillie vs. Detroit, 103 Mich., 283.
Atwell vs. Barnes, 109 Mich., 10.
Moore vs. McIntyre, 110 Mich., 237.

I respectfully submit that this case ought to be decided upon the principle and rule laid down that special assessments, like all other taxation, is the exercise by the state, either directly or through its municipalities, of the sovereign power of taxation. Second, that the assessment or tax thus imposed is in the nature of a burden; a duty which every inhabitant owes to the state to assist in bearing such burden. Third, that the question of benefits or advantages to be derived from the local improvement is but an incident, and not the necessary foundation of the power to impose such tax or assessment. Fourth, that when the legislature, either by itself or by delegation to one of its agencies, has fixed and determined a district, and apportioned the cost thereon, *ratably upon all alike within such district*, no constitutional rule is violated. Fifth, it should be laid down by this court as a principle, that any state possesses the power to levy taxes and assessments within its jurisdiction in any manner that the legislative wisdom or judgment may determine, unless restrained by some constitutional limitation, to be found in the constitution of such state. Sixth, that such matters of local state policy are of no concern to the Federal government, and hence, no federal

question is involved in this case. That the complainant has not set forth a case which entitles him to equitable relief, because he has not offered to do equity, and seventh, if the Court should hold to complainant's contention that the assessment cannot be sustained in its entirety, then the court should direct reference to the court below to ascertain the extent to which complainant has been benefited, by reason of this improvement, and enter a decree accordingly.

Very respectfully,

TIMOTHY E. TARSNEY,

Corporation Counsel for the City of Detroit, Solicitor for *Appellants*.

No. 411. and 508.

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Clerk.

Brief of Joslyn for City of Detroit

Supreme Court of the United States

October Term, 1900.

Filed Feb. 25, 1901.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

No. 508.

CASS FARM COMPANY (LIMITED); J. O. HARRIS, BRYANT WALKER, ET AL.,
PLAINTIFF IN ERROR.

vs.

CITY OF DETROIT, THE BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. MORELAND, ET AL.

In Error to the Supreme Court of the State of Michigan.

BRIEF OF C. D. JOSLYN

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BRIEF FOR APPELLANT.

From those allegations in the bill and answer in the cause first entitled above, which were taken as true, and from the proofs taken, the following facts appear:

The bill of complaint was filed to set aside certain assessments and tax sales of the appellee's land for delinquent taxes or assessments levied, one to defray the cost of grading and paving Woodward avenue and the other to defray the cost of grading and paving Blaine avenue, both in the City of Detroit. The two improvements and the assessments therefor were separate proceedings had at different times.

Woodward and Blaine avenues run at right angles to each other and intersect. The property of the appellee is situated at the southwest corner of said intersection, and consists of a house and lot, the latter having a frontage of 68.89 feet on Woodward and 200 feet on Blaine avenue. Its value is $10,000 and upwards. The other lots on Blaine avenue are 127½ feet deep, with a frontage varying from 40 to 50 feet. A map is herewith attached showing the location of the property.

In December, 1892, the Common Council of the City of Detroit ordered Woodward avenue to be graded and paved from Pallister avenue to the Joy road, and in March, 1893, a contract to perform said work was let for the sum of $55,-634.78. An assessment roll in four parts was duly made and the entire cost of the improvement, less the cost of grading and paving the intersection of streets and alleys, was assessed against the property, including that of the appellee, abutting on the improved portion of the street, *pro rata*, according to the frontage thereof on Woodward avenue. The amount assessed against the property of the appellee was $491.44, but he did not pay it, nor any part thereof, so on the 25th day of March, 1897, his said property was sold for the delinquent taxes, and was bid off to the City of Detroit. The time for redemption expired a year later, under the law, and said sale has now become absolute.

In February, 1896, Blaine avenue was similarly ordered to be graded and paved and a contract was duly let to perform said work for the sum of $11,462.32. Another assessment roll to defray the cost of the latter improvement was also duly made in four parts against the property, including that of the appellee, abutting on the portion of Blaine avenue thus improved, in the same manner as the assessment was made on Woodward avenue. The amount assessed the property of the appellee, for this improvement, was $442.68. The appellee did not pay this assessment, nor any part of thereof, so as each part became delinquent, the property was sold for such delinquency, and the sales for the first three parts have become absolute. The property was bid off to the City of Detroit, there being no other bidders.

The statutes under which these proceedings were had are a part of the charter of the City of Detroit, two copies of which we produce for the use of the Court.

Section 6 of Chapter 11 of the charter, being Compilers' Section 188, prohibits grading and paving to an extent exceeding $200,000 in any one year except upon the petition of the holders of the greater portion of the lands abutting on the part of the street proposed to be improved.

Section 33 of Chapter 11, being Compilers' Section 215, provides for entering into contracts for grading and paving

110
109
108
107
106
105
50
127.50
ALLEY
20
104
103
200
68.90
68.89
CURB
20
BLAINE
PAVED IN 1896
CURB
CURB
AVE
12
26
17
6
5
4
3
2
1
50
117.50
ALLEY
20
102
101
200
60
66.50
CURB
WOODWARD
80
PAVED IN 1894
AVE
CURB
20
CURB
Scale: One inch = 100 feet.
CITY ENGINEERS
FEB 6 1901

and for assessing the cost upon a local district. The portion of the section which bears upon the question under discussion is as follows:

> Sec. 33. Whenever the Common Council shall order any street or any portion thereof to be graded, or graded and paved, or repaved, it may enter into contract for the making of such improvement according to the provisions of this charter, and after the cost and expense thereof has been ascertained, it shall cause the same, except the cost of repaving, the cost of crosswalks, and of the work at the intersections of cross streets, to be assessed upon the lots and real estate herein made subject to such assessment as hereinafter provided. * * *

Section 39, Compilers' Section 216, provides that the property abutting on the unpaved portion of the street shall constitute one local assessment district, but gives the Common Council power to subdivide into two or more assessment districts. A portion of it is as follows:

> Sec. 34. For the purpose of such assessment, the lots and parcels of real estate situated on said street and fronting the portion thereof ordered to be improved, shall constitute one local assessment district, unless the Common Council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts. Such subdivision, if made, must be done before asking bids for the work: and in no case shall a city block be divided in making such division. * * *

Section 35, Compilers' Section 217, provides for an assessment *pro rata*, according to frontage, and provides for relief where assessment is unjust because of irregular shaped lots.

> Section 35. The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for the crosswalks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably, according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district: Provided, that if the assessment made on any such lot, or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the Common Council to be inequitable, said council may direct a just portion of such assessment to be paid out of the general road

fund. * * * The word "front" as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved.

Section 36, Compilers' Section 218, points out how to assess land not platted into lots.

Whenever in the improvement of a street as aforesaid, any land or real estate which has not been duly platted into city blocks or lots, shall be required to be assessed to pay any part of the cost of such improvement, the council shall designate such part or parts thereof for such assessments as shall correspond as near as practicable to the portions of the block or blocks nearest adjacent thereto, subject to like assessment, and the part or parts so designated shall be assessed as near as may be in the manner herein provided for the assessment of lots.

Section 37, Compilers' Section 219, is quoted in full. It is the only provision of law relative to notice to the taxpayers, and a question is raised as to its sufficiency under constitutional rule.

Sec. 37. The Board of Assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, constituting a local assessment district as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper, that such roll is completed, and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of such roll, sign the same and report it to the Common Council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections. And when the same shall be corrected to the satisfaction of said council, it shall, by resolution, confirm the same.

> After such confirmation, such assessment shall constitute a lien, until paid, upon said lots or parcels of real estate, and shall be collected in such manner as may be authorized by law.

With the foregoing facts and charter provisions before it, the Circuit Court below granted a decree for the complainant, cancelling the assessments and setting aside the sales for delinquent taxes.

With respect to the facts in cause No. 511, submitted herewith, we are content with the statement made in the brief of Messrs. Russel & Campbell. It is claimed in both cases that the assessments complained of were in violation of the XIV. amendment of the Constitution of the United States.

As we understand it, there are but two propositions presented: First, a statute, directing an assessment to defray the cost of grading and paving a street to be made *pro rata* according to the frontage of the property assessed, excludes any consideration of benefits and is therefore unconstitutional.

Second, that the statute under consideration provides no opportunity for the persons assessed to be heard on the question of benefits, and therefore a proceeding under it, is in this respect, taking property without due process of law, and violates the XIV. amendment to the Constitution of the United States.

There have been so many recent decisions in different parts of the country by Circuit Courts of the United States and by some State Courts which seem to hold that the main question here presented has been disposed of by the decision in the case of Norwood vs. Baker, 172 U. S., page 269, that we have approached the discussion of the question with considerable embarrassment, but the recent decision in the case of Loeb vs. Trustees of Columbia Township, decided last December by this Court, if we correctly understand it, relieves us somewhat of our embarrassment and shows that the question is still open for discussion.

As we understand the import of the decision in the case of Norwood vs. Baker, it was not intended to overrule any previous decision of this Court, but simply held that there are limitations upon the power of the Legislature, even in regard to taxation, which the judiciary ought to, and will, enforce in a proper case, or to use the better language of the opinion, "the power of the Legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizens' right of property."

In the case referred to there was a proceeding under the power of eminent domain by which Mrs. Baker's property was

taken from her for public use and for which it was pretended to give her adequate compensation, but the proceedings which followed, in the exercise of the power of taxation, took away this compensation and added to the injury by assessing her the cost of the proceedings besides. In other words, there was a dove-tailing of two proceedings, one under the power of eminent domain, and the other under the power of taxation, and when combined, the result was that Mrs. Baker had not only been deprived of certain land which she owned, but had been compelled to pay the expense of taking it away from her,—a result which ought not to be tolerated in any country where justice reigns. We think the transaction was well described by the counsel for Mrs. Baker when he said: "The case would not be any different if its council, after the condemnation proceedings and after the payment of the money to complainant, knowing it to be in her house, had left the council chamber, gone to her dwelling, demanded of her that she give the money back to the town, and refusing to do so, had taken it from her."

The exact counterpart of this case was attempted some years ago in the State of Michigan, where, in speaking of the facts, the Court said: "The result of all this was, not only that the Scripps property was taken without compensation, but they were assessed $115 for the privilege of having it done. They appeal on various grounds, among other things, the right to allow such results to be reached. The injustice of the finding is so monstrous that we should have no hesitation in setting it aside under the general power given us to review such proceedings."

City of Detroit vs. Daly, 68 Mich., at page 506.

We think, too, that the proceedings under the Norwood case were had under a statute which permitted municipalities to make an assessment without any consideration of benefits. And here we may as well admit at the outset of the discussion that, if this Court can say that the assessments in the cases at bar were levied under a rule which had no regard whatever to the benefits received by the property assessed, then they must go down.

> "The Legislature, in the exercise of the right of taxation, has the authority to direct the *whole or such part as it may prescribe* of the expense of a public improvement such as the establishing, the widening, the grading or the repair of a street to be assessed upon the owners of land benefited thereby."

Bauman vs. Ross, 167 U. S., at page 589.
Davidson vs. New Orleans, 96 U. S., 97.
Hagar vs. Reclamation Dist., 111 U. S., 701.
Spencer vs. Merchant, 125 U. S., 345.

Wallston vs. Nevin, 128 U. S., 578.
Lent vs. Tillson, 140 U. S., 316-328.
Ill. Cen. R. R. vs. Decatur, 147 U. S., 190.
Paulsen vs. Portland, 149 U. S., 30.

Also

Willard vs. Presbury, St. U. S., 14 Wall., 676.
Mattingly vs. Dist. Columbia, 97 U. S., 687.
Shoemaker vs. United States, 147 U. S., 282.

To determine the amount of taxes to be levied upon a local taxing district is, under all constitutional rules, equivalent to determining the amount of benefits which the district has received or will receive from the improvement for which the tax is proposed to be levied.

It will be conceded as a general proposition that the Legislature may fix a local taxing district and apportion an assessment to be levied upon it, provided it makes it according to benefits and that, under this rule, it may assess upon the district the entire cost of the improvement for which the assessment is made. The question then, before us, is this: can the Legislature establish a rule for assessment in advance of making the improvement, or must it wait until the cost of the improvement has been ascertained? Has not this Court answered this question?

> "The class of lands to be assessed for the purpose may be either determined by the Legislature itself by defining a territorial district or by other designation, or it may be left by the Legislature to the determination of commissioners and be made to consist of such lands and such only as the commissioners shall decide to be benefited."

Spencer vs. Merchant and Shoemaker vs. United States, above cited, and
Fallbrook Irrig. Dist. vs. Bradley, 164 U. S., 112, 167, 168, 175, 176.
Utman vs. Baltimore, 165 U. S., 719.

See also People vs. Brooklyn, 4 Comst. (N. Y)., 419, approved by this Court.

> "The rule of apportionment among the parcels of land benefited, also rests within the discretion of the Legislature and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

Mattingly vs. Dist. Columbia,
Spencer vs. Merchant,
Wallston vs. Nevin,

Lent vs. Tillson,
Paulsen vs. Portland,
Fallbrook Irrig. Dist. vs. Bradley,

above cited.

It ought to be assumed, we think, that the Legislature is informed of the general condition of the cities and villages which it has created, and of their needs, and it may be presumed to legislate fairly with regard to them. We think it is not to be supposed that a Legislature, in prescribing how local assessments shall be made for grading and paving streets in one of the municipalities of the State, acted without knowledge on the subject, nor that it acted capriciously or wantonly. There is evidence before this Court in the charter provisions themselves, which we have quoted, that the Legislature of the State of Michigan took considerable pains to prevent injustice so far as it could. For instance, it provided that in grading and paving a street it might divide the work into sections and make separate assessment rolls for each section, so that if the expense of grading one portion of a street should be greater than that of another, the assessment could be correspondingly adjusted.

Sec. 34, quoted herein.

Another provision gives the Common Council power to relieve where the assessment appears to be unjust, because of the irregularity in the shape of any lot.

Sec. 35.

Still another provision is with reference to lands that are not platted into lots, giving the council power to designate as abutting property to be assessed a sufficient amount of the unplatted land as shall correspond, as near as practicable, to that portion of the assessment district platted into lots.

Sec. 36.

It also provides that the city shall not grade and pave to an amount exceeding $200,000 in any one year, except upon petition of the holders of the greater portion of the land fronting on the proposed improvement.

Sec. 6, 188.

We speak of these provisions merely to demonstrate that the legislation was neither careless, capricious nor wanton.

The Legislature divides the State into counties. Each county, for many purposes, is a local assessment district, and the Legislature provides in advance what may be assessed upon that district. It also divides counties into townships, which

are likewise local assessment districts for certain purposes. It also provides in advance what may be assessed upon them. Townships are subdivided into road districts, each one of which is a local assessment district, and the statute provides in advance what may be assessed upon each one of these. The township is also divided into school districts, and each one of these school districts is a local assessment district, and the Legislature provides in advance what may be assessed upon these. Each one of these districts is authorized in advance to make certain improvements and to assess the cost of those improvements upon the district. The Legislature may specifically authorize the construction of a bridge, mark out the local assessment district for it and direct in advance that the entire cost of the bridge be levied upon it.

All these things are necessary to the proper conduct of the internal affairs of the State and its many subdivisions. Although many technical questions have arisen over the administration of these powers, yet we are not aware that the power of the Legislature to do these things in advance has been questioned.

In the organization of a great city it is always necessary to lay down some rules and make some provisions for the conduct of its internal affairs. Streets must be paved, improved, repaired and maintained. Sewers must be constructed. Many other improvements must be made. It is conceded that the cost of all these things may be assessed upon the property which has been or will be specially benefited by these improvements to the amount of the benefits. This has been directed by the Legislature of Michigan with reference to the City of Detroit. This Court is now asked to say that in laying down rules by which the City of Detroit is to be guided in making assessments for grading and paving its streets, the Legislature, in defining the limitations of taxing districts therefor and directing that the whole of the cost to be levied thereon did not or could not take into consideration the benefits accruing to the district from such improvement. Is it impossible for the Legislature to make this determination, or must the assessment for benefits be left to the ever-varying discretion of some local officer or board?

It will be conceded, we suppose, that the Legislature might have provided the rule in advance that the entire cost of any specific grading and paving should be assessed upon the whole city. Does its power to do so disappear with the attempt to make the taxing district less in size than the entire city? The city is divided into seventeen wards, each one of which is locally assessed for what is now the ward road district fund. Had not the Legislature power to grant such an authority? If the Legislature may in advance make the city one assessment district,

may it not make a ward a local assessment district, or are we to say that the power of the Legislature to make a rule in advance, upon this subject, depends upon the size of the assessment district?

A large number of courts and many Legislatures have made a distinction between assessments for benefits derived from opening a street and assessments for benefits derived from grading and paving a street after it is opened. The Michigan Legislature, with reference to street openings in the City of Detroit, instead of fixing a taxing district and directing a portion to be spread thereon, has left the determination of these questions to the Common Council, but with regard to grading and paving, has defined the rule of assessment itself and fixed the district, and the Supreme Court of Michigan has repeatedly held that assessments thus directed by the Legislature to be made according to frontage are valid.

Williams vs. Mayor, 2 Mich., 560.
Motz vs. Detroit, 18 Mich., 495.
Sheley vs. Detroit, 45 Mich., 431.
Kalamazoo vs. Francois, 115 Mich., 554.
Cass Farm Co., Ltd., vs. Detroit, 7 Detroit Legal News, p. 281.

the latter being one of the cases now being considered here.

With regard to street opening assessments it has made a different determination.

Detroit vs. Judge of the Recorder's Court, 112 Mich., 588.

The writer has often thought that perhaps it has been the marked distinction between the different kinds of improvements that has led to the apparent confusion on the subject of local assessments.

For instance, it seems to be almost universally recognized that grading and paving a street in a large city is certain to benefit the abutting property, while opening a street through a piece of property and taking a part of it may or may not benefit that which remains.

To illustrate in a specific way: In the case of Norwood vs. Baker, a highway was opened through Mrs. Baker's property connecting streets which led up to it on either side, affording greater convenience to the property adjoining Mrs. Baker's and to the public at large. It seems to us that it is purely arbitrary to say under such circumstances that the abutting land of Mrs. Baker was the only property specially benefited by the improvement. The streets may have been laid out about her land in such a way that no new street, so far as her land was concerned, was necessary. Again, her land might have been situated so that cutting a highway through a portion of it or

through the middle of it would destroy the market value of the remaining land. It would seem to be certain that whether opening a street is a direct benefit to the abutting land or not must always depend upon circumstances. This cannot be said of grading and paving a street. It may be fairly asserted of this improvement that it always benefits the abutting property. In Detroit, under the law, most of it is done at the request of the property holders.

It may be argued that there might now and then be a case where the benefits would not equal the cost of the improvement and possibly this may be so, but these could only be regarded as exceptions to the general rule.

As to the second proposition, which relates to the question of the right of the taxpayer to be heard on the question of benefits and also involves the question of notice, there is very little to be said.

With regard to local assessments, three things are required to be done.

First. Fixing the local assessment district.

Second. Determining the amount or portion to be spread upon such district.

Third. Apportioning the amount determined upon among the different parcels of land in the district.

It has been shown already that the first two questions are purely legislative and cover the question of benefits. They are legislative because they are questions of public policy. The question of whether or not a tax shall be raised and how much is always a public and legislative question in which all alike are interested, but when these legislative determinations have been made and the proper board or officer proceeds to carry them into effect by making a tax roll which describes the individual properties to be taxed and sets forth and apportions the amount of the tax on each, then the proceedings reach the individual and before such tax can be enforced against him or made a lien upon his property, he certainly has a right to be heard. He has a right to know whether the tax ordered by the Legislature has been equally and properly apportioned between him and his neighbors.

This opportunity has been provided for by the charter provision which has been cited. This section provides that the Board of Assessors, after completing the roll, shall give notice by at least five publications that such roll is completed and will remain in their office from the first publication of said notice for the inspection of all concerned. After any needful correction and revision is made, it is then sent to the Common Council for confirmation. That body is also given the power to direct

further correction to be made. This provision has been construed by the Michigan Supreme Court as giving taxpayers a chance to be heard.

Beecher vs. Detroit, 92 Mich., at page 274.
Voigt vs. Detroit, 7 Det. Legal News, page 23.

As to the proposition that the taxpayer is entitled to be heard upon legislative questions, such as the first two stated above, we are not aware that it is sustained by any authority, but whether it is or not, we suppose this Court has settled that question.

> "If the Legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Spencer vs. Merchant, already cited.
McMillan vs. Anderson, 95 U. S., at page 37.
Davidson vs. New Orleans, already cited.
Hagar vs. Reclamation Dist., above cited.

Notice by publication is sufficient.

Davidson vs. New Orleans.
Spencer vs. Merchant.
Lent vs. Tillson.
Paulsen vs. Portland.
Fallbrook, etc., vs. Bradley.
Already cited.

In conclusion, the case before us seems to be this.

The complainant neglected to pay his taxes for several years and then comes into court, without alleging that any wrong has been done him, without alleging that the taxes levied were unjust or even burdensome, without making any claim of oppression, and so far as the record discloses without even availing himself of the opportunity which the law afforded him to go before the board of assessors or the common council and complain, without showing that his property or any portion of it has been taken from him wrongfully, and asks that the taxes be cancelled and that the tax sales be set aside. He makes no complaint of any irregularity in the proceedings, but bases his whole claim upon the bare proposition that a rule adopted by the Legislature, directing an assessment to defray the cost of grading and paving the street in front of his property to be assessed pro rata according to frontage, excludes any consideration of benefits and is, therefore, unconstitutional.

This doctrine is revolutionary, and as we understand it, is not in accord with the cases adjudicated by this Court. Moreover, it is a dangerous innovation of the legislative domain. The judiciary cannot inquire into this question without determining what the benefits were and whether there were any. If it can do this with the legislative assessment it seems to be clear that it may make the same inquiry with reference to an assessment made by the local board or officer. The final result of it all would be that the judiciary would be called upon to determine in every contested case the question of benefits, and each case would, under the claims made by complainant, present a Federal question, to be finally determined by this Court. As we understand the import of the Norwood decision, it simply determines that there had been an abuse of legislative power, and that the language of the Ohio statutes permitted the local body to make an assessment without considering the benefits. The very language of the statute indicates that.

It gives the council an option to assess according to benefits received or to do something else, allowing the council to determine which method it would adopt. This would be an assessment without regard to benefits. We know of no decision which permits this to be done. We suppose the doctrine to be that the courts may inquire into the question of an abuse of legislative discretion, precisely as a superior court may inquire into the abuse of discretion by an inferior court. In either case, unless such an abuse clearly appears, the exercise of discretionary power is not interfered with.

In Pennsylvania a distinction is made between urban and suburban highways, where it is held that assessments, by frontage, within cities are just and proper, while it is "ruinously unjust" when applied to farm lands outside of cities. While other courts reject this distinction it must be admitted there is much force in the reasoning which makes it.

Seely vs. Pittsburgh, 82 Pa. St., 360.

Kentucky and Iowa courts have made distinctions of a similar character. But we speak of these merely as illustrative of what we think is the proper rule relative to interference with legislative discretion; viz., that it must clearly appear that there has been an abuse of it.

If the Legislature adopts a rule of assessment which, *on its face*, or which in its certain operation provides for the "exaction, from the owner of private property, of the cost of a public improvement in *substantial* excess of the special benefits accruing to him, is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use with-

out compensation," and for that reason, is an abuse of legislative discretion.

Does the rule that the cost of grading and paving a street may be assessed upon the abutting property according to frontage, herein complained of, come within the foregoing classification? We submit that it does not.

It is common knowledge that grading and paving a street does always improve and benefit the abutting property. Is it for the Court or the Legislature to say how much the benefit is?

But the complainant is pursuing a shadow. If the present rule be set aside, it follows that the benefits must be determined by some local board. That board is subject to constant change. The amount of benefit received from a public improvement is always a matter of opinion. The opinion of a local board this year may not be the same as the new one next year. If each individual case is to be determined by itself as it occurs, then whim, bias, prejudice, self-interest, political influence will to a greater or less extent enter into the determination of benefits. How much better to lay down a fixed rule which applies to all cases of like character and which courts recognize as "more just than any other."

Williams vs. Mayor, etc., 2 Mich., 560.
Sheley vs. Detroit, 45 Mich., 431.

Is not the adoption of such a rule far preferable in all cases where it can safely be done?

Nothing can be gained by leaving the determination of benefits to a local board. Its determination will be final and not subject to judicial review, except for precisely the same reason that the legislative determination can be reviewed, viz: that it has abused its discretion.

In the court below, the question was asked if the Common Council could not, under our theory, pave a street with gold and assess the cost upon the abutting property. It certainly could not. That would be an abuse of discretion. But it could be done just as well under the rule for which they contend as under the rule which they assail. In any event, the determination of the benefits must be left to the discretion of some one and that determination is final, except it is made to appear that there has been an abuse of discretion.

If the local body is controlled by a fixed rule which is known and recognized as a just one in the long run, is it not better for all concerned, and especially for those who are to be taxed?

C. D. JOSLYN,
Of Counsel for City of Detroit.

FILED
JAN 7 190
JAMES H. McKENNEY,
Cl

No. 411.

Brf. of Bacon for D. C. to me

Supreme Court of the United States.

Filed Jan. 7, 1901.

October Term, 1900.

CITY OF DETROIT,
THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and
WILLIAM B. THOMPSON, Treasurer of the City of Detroit,
Plaintiffs in Error,

vs.

RALZEMOND A. PARKER,
Defendant in Error.

411

BRIEF FOR DEFENDANT IN ERROR ON MOTION FOR ADVANCEMENT OF CAUSE.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

POTTER PRINTING CO., DETROIT, MICH.

Supreme Court of the United States.

October Term, 1900.

CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and WILLIAM B. THOMPSON, Treasurer of the City of Detroit, *Plaintiffs in Error,* *vs.* RALZEMOND A. PARKER, *Defendant in Error.*	

BRIEF FOR DEFENDANT IN ERROR ON MOTION FOR ADVANCEMENT OF CAUSE.

The defendant in error comes by Elbridge F. Bacon, his counsel, and joins with the plaintiffs in error in asking that this cause be advanced on the call and order of the docket.

This case, as is stated in the brief of plaintiffs in error, is of great public interest, not only to the city of Detroit and the cities and villages in the State of Michigan, but

also to the cities and villages of a number of other states which have substantially the same provisions in their charters and laws for levying paving and other assessments by the front foot.

The case of *Webster vs. City of Fargo*, which was appealed from the Supreme Court of North Dakota, and the case of *Lyon vs. Tonawanda*, which was appealed from the Circuit Court of the United States for the Northern District of New York, are both on the docket of this Court for the present term, and involve the same questions as this case.

We are also informed that the case of *French vs. Barber Asphalt Company*, which is a suit between private parties, and was appealed from the decision of the Supreme Court of Missouri, rendered in November, 1900, subsequent to the appeal in this case, and which involves, to a certain extent, the same questions as this case, has been advanced and set for hearing on February 25th, 1901.

These four cases involve substantially the same questions, and the parties in all of them desire to be heard before the questions are finally disposed of by this court. We are authorized by the counsel for the plaintiffs in error in the cases of *Webster vs. City of Fargo*, and *Lyon vs. Tonawanda*, to say that they desire to have those cases advanced and heard at the same time with this case.

As these cases involve questions of great public interest, and the effect of the decision of this court will be far reaching, and will dispose of a large number of cases now pending in the different States, we would suggest that all of these cases be set for hearing at the same time as the case of *Barber Asphalt Company vs. French*, and that all the parties interested in these four cases may be represented by counsel and heard at that time.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

No. 411.

Br. of Bacon for D. & E.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING, AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF ELBRIDGE F. BACON, COUNSEL FOR DEFENDANT IN ERROR.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

FOTHER PRINTING CO., DETROIT, MICH.

(17,898.)

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING, AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF ELBRIDGE F. BACON, COUNSEL FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case was brought by complainant to set aside certain assessments and sales of his land for paving Woodward and Blaine avenues, in the City of Detroit.

The property consists of a house and lot situated on the south-west corner of Woodward and Blaine avenues, in the City of Detroit, having a frontage on Woodward avenue of 68.89 feet, and extending west on Blaine avenue 200 feet.

This property is worth upwards of ten thousand dollars, and has a rental value of eight hundred dollars per year.

In 1893, the Common Council of the City of Detroit caused Woodward avenue to be paved 70 feet wide, with asphalt, at a total expense of $55,634.78, all of which, except the cost of paving intersections of streets and alleys, was assessed on the property abutting upon that part of Woodward avenue paved, pro rata, according to frontage.

The amount assessed on complainant's lot was $491.44, being at the rate of about $7.00 per foot front.

March 25th, 1897, this lot was sold for the taxes assessed for paving Woodward avenue, and bid off to the City of Detroit for ninety-nine years. Redemption from the sale expired March 25th, 1898, and the city now claims the title to said lot under said sale for a period of ninety-nine years.

In 1896, the Common Council of the City of Detroit, to pave Blaine, caused Blaine avenue to be paved at a total expense of $11,462.32, all of which, except the cost of paving intersections of streets and alleys, was assessed on the property abutting on that part of Blaine avenue paved, pro rata, according to the frontage thereof.

Complainant's lot fronted on Blaine avenue 200 feet, and was assessed for $442.68, being at the rate of $2.20 per foot front. All the other lots fronting on Blaine avenue, except the complainant's, were 127 1-2 feet in depth, and had a frontage varying from 40 to 50 feet.

Complainant's lot was afterwards sold for paving Blaine avenue, and bid off to the City of Detroit for ninety nine years. Redemption has expired, and the city now claims title to said lot under said sale.

This case was heard before Judge Swan, and decree entered vacating the sale of complainant's land for said assessments, and setting aside the taxes, on the ground that the charter and ordinances of the City of Detroit, providing for the assessment of paving taxes, deprived the complainant of property without due process of law, and were in violation of the fourteenth amendment to the Constitution of the United States.

Parker vs. Detroit, 103 Fed. R., 357.

And from this decree the city appealed.

The charter and ordinances of the City of Detroit, so far as they are material to the question in this case are as follows:

Sec. 35 of Chapter XI. of the Charter of the City of Detroit provides:

"The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross-streets and alleys, and for the cross-walks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably according to their extent of front on the lots, parts of lots or parcels of real estate directly fronting on and within the local assessment district provided. * * * * * * The word 'front,' as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved."

Sec. 43. "The Board of Assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate constituting the local assessment district, as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the

length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper, that such roll is completed and will remain in their office for twelve days from the publication of said notice, for the inspection of all concerned. At the expiration of said twelve days said board shall, after any needful revision and correction of such roll, sign the same and report it to the common council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or correction, and when the same shall be corrected to the satisfaction of said council it shall, by resolution, confirm the same. * * *."

CHAPTER X.

SEC. 11. "The owners or occupants, or parties in interest to any real estate assessed under this chapter, shall be liable to pay every such tax or assessment, and if the same shall not be paid by the first day of February following, or any part thereof, it shall be lawful for the receiver of taxes to cause a notice to be published in the official daily newspaper for the city, once a week for four successive weeks, and posted in three or more public places in each ward, requiring the owners or occupants of, or parties interested in such lands, tenements, hereditaments or premises, to pay such assessment or tax, and that if default be made in making such payment, such real estate shall be sold at public auction, at a day and place to be specified in said notice, for the lowest term of years at which any person shall offer to take the same, in consideration of advancing and paying such assessment or tax, with the additions provided in this act, and the cost and expense of advertising. The common council, in its discretion, may cause said notice, or any part thereof, to be published in a German newspaper in said city."

CHAPTER X.

SEC. 12. "If the owner or occupant of, or parties in interest in such real estate, do not pay such assessment or tax, with costs, additions and charges, within the period above prescribed for the publication of said notice, the said receiver shall have the power, without further notice, to cause such real estate to be sold at public auction, for the lowest term of years at which any person shall offer to take the same, in consideration of advancing such assessment or tax, with the costs, additions and charges, and to direct the execution of a proper certificate of such sale to the purchaser thereof; and if such real estate shall not be redeemed within one year after such sale thereof, as hereinafter provided, the controller shall, in the name of the

city of Detroit, execute and deliver to such purchaser or his assigns, a proper deed for the conveyance of such real estate for the term for which the same was sold; which deed shall be *prima facie* evidence of the regularity of all the proceedings under which the sale was made and said deed was executed, up to the date of such deed. * * *."

CHAPTER X.

SEC. 18. "It shall be the duty of the controller to bid for the corporation at any sale of real estate for assessments or taxes, every lot of land or premises for which no person shall offer to bid. * * * Upon all such bids by the controller, and all bids as aforesaid, to the use and benefit of the corporation, conveyance and certificates of sale may be executed by the controller to the corporation, acknowledged and attested by the city clerk, and recorded in the same manner as provided in other cases of sales for assessments of taxes. * * *."

CHAPTER X.

SEC. 20. "Assessment rolls to defray the expense of construction of lateral sewers, side and cross-walks, paving, grading, macadamizing, graveling or otherwise improving streets, lanes, or alleys, or for defraying the expense of any local improvements properly payable from the proceeds of special assessments, shall be placed in the hands of the receiver of taxes for payment, as may be provided by ordinance or resolution of the common council for the space of thirty days, after which warrants for the collection of the same may be issued, and such proceedings for the collection thereof be had as are or shall be prescribed by law, or by any ordinance or resolution of the common council, and sales of any real or personal estate for any unpaid assessment shall be made in like manner, and with like effect, as in the case of sales for the non-payment of the general tax."

I.

The only theory upon which an assessment for a local improvement can be sustained, is that the property assessed is peculiarly benefited beyond the benefits received by the community at large.

"Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they

are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay."

Cooley on Taxation, 606.

"Special benefits to the property assessed; that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest, and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made."

2 Dillion's Mun. Corp., Sec. 761.

"Undoubtedly abutting owners may be subjected to special assesments to meet the expenses of opening public highways in front of their property, such assessments, according to well established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from puplic improvements."

Norwood vs. Baker, 172 U. S., 269, 278.

"It has been repeatedly held that assessments for local improvements can be sustained only upon the theory that the lands upon which they are laid are specially benefited thereby; that a law authorizing such assessments without reference to benefits, would in its operation take property for public benefit without compensation, or take property from one person for the benefit of another; and any other view would be unconstitutional."

Dietz vs. City of Neenah, 91 Wis., 422, 427.

"The assessment cannot exceed the benefit to be derived from the improvement, for the reason that the only principle upon which such special assessments can be made at all is, that the value of the property is enhanced by the expenditure."

White vs. Saginaw, 67 Mich., 33, 40.

"The sole ground for imposing a part or all of the cost of a public improvement upon one part of a municipality, is that the part burdened with the cost receives corresponding benefits which the general public does not receive."

Detroit vs. Judge of Recorder's Court, 112 Mich., 558.

"The basis upon which an assessment such as that now in controversy is supported, is that of benefit derived to the property assessed by reason of the making of an improvement at once local and public in its character; the amount assessed being, as observed by Mr. Justice Bronson, an equivalent or com-

pensation for the enhanced value which the property of the person assessed has received for the improvement. It is only because of the special benefit received that specific property is taxed for a specific purpose. The assessment upon property is, therefore, laid with reference to the benefit which such property is supposed to receive from the expenditure of the money."

Re Market Street, 49 Cal., 546, 549.

II.

The benefit to property which will authorize a special assessment to be made for a local improvement must be a direct and immediate benefit, and one which increases the market value of the lands.

"It has been said that in assessing benefits the only safe and practicable course, and the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement on the market value of the property, what the property is now fairly worth in the market, and what will be its value when the improvement is made."

Cooley on Taxation, 660.

"The rule is well established that in making special assessments for local improvements, the measure of benefits to be assessed is to be determined by the increased market value of the *res* against which the assessment is made."

Rich vs. City of Chicago, 152 Ill., 18, 31.

"The only safe and true course, the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement upon the market value of the property, what is it now fairly worth in the market, and what will be its value after the improvement is made."

State vs. Mayor of Newark, 35 N. J. L., 157.

"Assessments for city and village improvements are not regarded as burdens, but as an equivalent or a compensation for the enhanced value which the property of the persons assessed has derived from the improvement."

Hale vs. City of Kenosha, 29 Wis., 599, 606.

"To render the assessment of benefits legal and valid it must appear that the benefit is direct and immediate, and not contingent and remote."

Hartford vs. School Dist., 46 Conn., 462.

"The principle which underlies special assessments is that the value of the property is enhanced to an amount, at least, equal to the assessment. This principle cannot be departed from without taking private property for public use."

Hanscon vs. City of Omaha, 11 Neb., 37.

While the decision in the case of *Norwood vs. Baker*, 172 U. S. 269, is unquestionably a correct statement of the principles underlying and governing special assessments for local improvements, and the case at bar is clearly within and governed by the principles laid down in the case, still, as the extent and effect of that decision is questioned by the counsel for plaintiffs in error, it seems desirable to fully examine the principles upon which these assessments are based and the rights of the taxpayers under said assessments.

It will be observed that there is a marked distinction between the principles which govern the levy of general taxes and those which relate to special assessments for local improvements, and much of the conflict of authorities on these questions arises from the failure to recognize these distinctions, and from applying principles relating solely to general taxes to assessments for local improvements.

Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for this means it has the right to compel all citizens and property within its limits to contribute, and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all.

On the other hand, special assessments, or special taxes, proceed upon the theory that when a local improvement enhances the value of nighboring property, that property, to the extent of the special benefit, should pay for the improvement.

Cooley on Taxation, 606.
Ill. Cent. Ry. Co. vs. Decatur, 147 U. S., 190.
Brooks vs. Baltimore, 48 Ind., 265.
Hale vs. Kenosha, 29 Wis., 599.
Hanscom vs. Omaha, 11 Neb., 37.
Rich vs. Chicago, 152 Ill., 18.
Jenkins vs. Andover, 103 Mass., 94.

III.

The right to levy an assessment for local improvements being based solely upon the benefit to the property assessed, it necessarily follows:

(a) *That property which is not benefited by the improvement cannot be assessed.*

"Legislative power to exact a special tax from a property owner rests upon the fact that there is a betterment of his property to the extent of the cost of the improvement. * *

If assessments are levied where there is no special benefit, the constitutional principle that the taxes shall be uniform and equal is violated, and the statute should fall."

Elliott on Streets, 392, 401.

"In this case it clearly appears that the property of the plaintiffs were in a way benefited by the alleged improvement, and hence there was no foundation for the exercise of discretion on the part of the council in the assessment of such property for its cost or any part thereof. Under such circumstances, the enforcement of the assessment would be taking property without due process of law."

Ore. & Cal. Ry. Co. vs. City of Portland, 25 Ore., 229, 240.

Where the assessment on the property for paving a street was $3000, and it appeared that the lots, after the paving had been completed, were not worth to exceed $1,000, the court say, (page 168): "It is thus seen that while special remuneration has no concern with taxation for general purposes, it is inseparable with the theory which sanctions assessments for local improvements. If the special 'remuneration in the way of benefits' be eliminated, then the improvements are conclusively in the interests of the general public, and the money raised to pay for them is in effect a section of the 'general revenue for the public at large,' levied 'under the guise of local assessments.' This is literally confiscation, which is merely a mode forbidden like every other of taking private property for public purposes without just compensation to the owner."

Zoeller vs. Kellogg, 4 Mo. App., 163.

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful as constituting an attempt to appropriate private property to public uses."

Thomas vs. Garin, 35 Mich., 155, 162.

"It has been repeatedly held that assessments for local im-

provements can be sustained only upon the theory that the lands upon which they are laid are specially benefited thereby; that a law authorizing such assessments, without reference to benefits, would, in its operation, take property for public benefit without compensation, or take property from one person for the benefit of another; and any other view would be unconstitutional."

Dietz vs. City of Neenah, 91 Wis., 432.

(b) *That the assessment can in no case exceed the amount of the special benefits accruing to the property by reason of the improvement.*

"There can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public use without compensation * * * * (663). It is clear that any assessment is wrong which charges land with a sum beyond the special benefits received."

Cooley on Taxation, 661.

"The conclusion to be drawn from the main current of decisions may, therefore, be said to be, that notwithstanding some apparent exceptions, local assessments are constitutional only when imposed to pay for local improvements clearly conferring local benefits on the property so assessed, and to the extent of those benefits."

Hare's Am. Const. Law, 390.

"If a municipal corporation sees proper to avail itself of the assessment mode of taxation to pay in whole or in part for local public improvements, and in making such, the property of individuals, owing to its proximity to the improvement, is specially benefited, it is but just that such property should pay toward the cost of the improvement a sum that is equal to the value of the special benefits conferred, for to this extent it is peculiarly benefited over and above that of other individual members of the public * * * * (564). Such assessments can be only constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed, and to the extent of those benefits."

Chamberlain vs. Cleveland, 34 O. St., 551, 561.

"It is a well established doctrine of this court that property can only be assessed for public improvements on the principle of benefits received by the property from the construction of the work, and that the assessment should never exceed the benefits conferred, and it is essential that it shall appear from

the proceedings themselves that such was the principle upon which the assessment was made."

Crawford vs. People, 82 Ill., 557.

"The act in question makes no express allusion to assessment on account of benefit, yet, as we have seen, the right to assess at all depends solely upon benefit, and must be apportioned to and limited by it. An improvement might cost double the benefit to the lands particularly benefited."

Barnes vs. Dyer, 56 Vt., 469, 471.

"Assessments for local improvements can only be constitutional when imposed for improvements clearly conferring special benefits upon the property assessed, and to the extent of those benefits. That an assessment upon an individual for a local improvement which is not grounded upon and measured by the extent of his particular benefit, will be clearly unconstitutional and void. To hold otherwise would sanction the doctrine that one man may be made to pay another's debt, to pay for improvements not upon his own estate, but upon another's."

Dyar vs. Farmington Village, 70 Me., 515, 527.

"Special taxes should be levied only for special benefits conferred upon the property of the individuals taxed, and never for the general benefits received and shared by all the members of the public in general, while the general taxes should be levied only for a public benefit. To levy a special tax upon the property of particular individuals for general revenue purposes would be a violation of section 1, article II., of the constitution. * * * * Only those who can use such sewer or sewers should be specially taxed to pay for their construction or maintenance, and each should be taxed specially only for the amount of the special benefits which the sewer or sewers might confer upon him, and each should be taxed specially precisely in proportion to the benefits which each individually receive."

Gilmore vs. Hertig, 33 Kas., 156, 168.

"The only just rule in such cases is that the cost should be proportioned on each according to benefit to him, and that the cost on no one shall exceed the benefit to him. This is the rule universally recognized."

Gamble vs. McCrady, 75 N. C., 509, 511.

"The legislature may create, or authorize the municipality to create a local taxing district for local improvement purposes, which includes part only of the property within the municipality. * * * Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits."

Adams vs. City of Shelbyville, 57 N. E. Rep. (Ind.,) 114, 118.

(c) *If the assessment is in any instance in excess of the value of the special benefit conferred, it is as to such excess private property unjustly taken for public use without compensation to the owner.*

"There can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public uses without compensation." * *

Cooley on Taxation, 661.

"In our judgment, the exaction from the owner of private property of the cost of a public improvement, in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."

Norwood vs. Baker, 172 U. S., 269, 279.

"If a sum is exacted in any instance in excess of the value of the special benefits conferred, it is as to such excess in that instance private property unjustly taken for public use without compensation. * * * (564.) Such assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed and to the extent of those benefits."

Chamberlain vs. Cleveland, 34 O. St., 551, 561, 564.

"It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal; but such a case, if it can ever arise, is certainly presented when property is specified out of which a public improvement is to be paid, if in excess of the value specially imparted to it by such improvement. As to such excess, I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. * * * (423.) When, then, the overplus beyond benefits from these local improvements, is laid upon a few land owners, such citizens with respect to such overplus are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the powers of taxation."

State vs. Newark, 37 N. J. L., 415, 422, 423.

Judge Sherwood: "Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is *pro tanto* a taking of his private property for public use without any provision for compensation. * * * (154.) Assessments on property peculiarly benefited by local improvements, and in consideration of such

benefit, are constitutional. Thus far have the judicial decisions in this and other states gone, and no further. * * * (157.) Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed, and to the extent of those benefits."

Hannrett vs. Philadelphia, 65 Pa. St., 146, 153.

(d) *That the excess of the cost of an improvement beyond the amount of the special benefits to the property assessed is a benefit to the municipality at large, and it must be borne by the general treasury.*

"If the cost of any improvement exceeds the local and peculiar benefits, the improvement should either not be made at all, or the excess should be assumed by the public and become a part of the general levy."

Cooley on Taxation, 663.

"When the property has paid the value of the special benefits so conferred, its owners stand in the same relation to any residue of the cost of the improvement remaining unpaid that other members of the public do, and all must bear the burden of paying such residue by general taxation."

Chamberlain vs. Cleveland, 34 O. St., 551, 561.

"A corporate purpose being ascertained and determined on by the city authorities, the principle should be adopted in order to carry it out, equally required by the constitution and demanded by the merest justice, assess to each lot the special benefit it will derive from the improvement, charging such benefits upon the lots and the residue of the cost be paid by equal and uniform taxation."

Chicago vs. Larned, 34 Ill., 203, 209.

"The taxing district as a whole may be assessed only to the extent of the special benefits actually received by the several parcels of contributing property. The improvement, so far as the cost exceeds the special benefit resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury."

Adams vs. Shelbyville, 57 N. E. Rep., (Ind.,) 114, 118.

In Dillon's Mun. Cor., Sec. 761, it is stated:

"The cost of a local improvement can be assessed upon particular property only to the extent that it is specially and particularly benefited, and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

IV.

The right to levy an assessment for local improvements upon the property benefited being based solely upon the benefit, and the amount of the assessment being limited by the benefit to each particular piece of property, the amount of benefits in each instance becomes a question of fact, and the taxpayer has a constitutional right to a hearing upon the question of the amount to be assessed for benefits before the tax becomes a fixed liability upon his property.

"It is a fundamental rule that in judicial or quasi-judicial proceedings affecting the rights of the citizen, he shall have notice and be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established against him. Tax proceedings are not in the strict sense judicial, but they are quasi-judicial, and as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are taken. Provision for notice is, therefore, part of the 'due process of law' which it has been customary to provide for these summary proceedings, and it is not to be lightly assumed that constitutional provisions carefully framed for the protection of property rights, were intended or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

Cooley on Taxation, 363.

"It is undeniably true that a fundamental principle of enlightened jurisprudence is that no citizen's property should be taken without granting him the right to be heard, or, as it is commonly said, giving him his day in court."

Elliot on Streets, 415.

"The judgment of the circuit court must be affirmed on the ground that the assessments against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

Norwood vs. Baker, 172 U. S., 269, 297.

Mr. Justice Field: "Whatever the character of the proceeding, whether judicial or administrative, summary or protracted, or whether it attacks property directly or creates a

charge or liability which may be the basis of attacking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolute and overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

San Macto vs. So. Pac. Ry. Co., 13 Fed. R., 722, 752.

Justice Field: "The suggestion of counsel that there is a difference in the law as to notice and opportunity of being heard where an assessment is made for local purposes and where it is made under a statute providing revenue for the state, is without foundation. Taxation for local improvements, or for city, county or town purposes, involves the exercise of the same power which is exerted in taxation for state or general purposes. It is the sovereign power of the state in both cases which authorized the tax, whether that power be exerted directly by the act of the legislature or by a municipal power as an instrumentality of the state. 'That these assessments,' says Cooley, speaking of such as are special, 'are an exercise of the taxing power, has over and over again been affirmed, until the controversy may be regarded as closed.'

"* * * * The object, both of taxation for general purposes and of assessments for local purposes, is to raise money. In both cases property is valued and a certain proportion of the valuation taken for the designated purpose. Whether that purpose be general or local it in no respect changes the essential character of the proceeding. The property from which the exaction is to be made is less extensive in the one case than in the other, and in both there must be evidence of its value and a judicial determination respecting it, and the fact that in cases of local improvements there is sometimes a consideration also of the benefits to be received, takes nothing from the judicial character of the proceedings. The clause of the constitution which forbids the deprivation of property without due process of law, places liberty under the same guaranty, and no one can be deprived of either property or liberty under the name of taxation, any more than under any other name, by officers of the state, without some notice of their proceedings and a right to be heard respecting their determination before it is executed."

Santa Clara vs. So. Pac. Ry. Co., 18 Fed. Rep., 385, 411.

Judge Jackson: "The owner must in some form, in some tribunal, or before some official authorized to correct errors or mistakes, have an opportunity before him to be heard in respect to the proceeding under which his property is to be taken or

burdened, before the tax or assessment becomes final or effectual, in order to constitute such procedure due process of law. "* * * * (400.) The common council of Toledo having made the assessment in question without notice to or opportunity for hearing by complainant, and having the right to enforce its collection by distraining and selling their property without resorting to any suit which would give them an opportunity to interpose any defense, either to the validity or amount of said assessment, its action in the premises, even if authorized by the statutes of Ohio, is wanting in that 'due process of law' required by the federal constitution before depriving a citizen of his property."

Scott vs. City of Toledo, 36 Fed. Rep., 385, 397, 400.

Judge Jackson: "It appears from the allegations of the bill that complainant has had no notice of or any opportunity to be heard in relation to the assessments made by the board of public affairs of Cincinnati against the several lots described in the bill; that no provision was made in any of the ordinances or resolutions or acts of said city of Cincinnati, or of its officers or boards, giving to property owners the right and opportunity to be heard in respect to the amount of the special assessments complained of, and that no such provision (as complainant alleges) exists in any of the laws of the state applicable to said city and the assessments in question. Under such circumstances the court is of the opinion, in conformity with its holding in the case of *Scott vs. City of Toledo, 36 Fed. R., 385*, that the assessments made against complainant's lands are wanting in due process of law."

Murdock vs. City of Cin., 39 Fed. R., 891.

"One principle runs through all these definitions. Webster expresses it tersely when he says, 'By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only on trial.' The party to be affected by the process which deprives him of his life, liberty or property, must have notice of the time and place of hearing in some form, and at some time he must have the privilege of being heard. He must have his day in court."

Myers vs. Shields, 61 Fed. Rep., 713-718.

"The imposition of taxes is, in its nature, administrative, and not judicial, but assessors exercise quasi-judicial powers in arriving at the value, and opportunity to be heard should be, and is, given to all just systems of taxation according to value."

Palmer vs. McMahon, 133 U. S., 660.

"The commissioners were to ascertain what land within the district of assessment was benefited, and then to apportion and assess the said sum upon such land in proportion to benefits.

The assessment, when made, was declared to be a lien upon the land, and its payment could be enforced by the sale thereof. I am of opinion that the constitution sanctions no law imposing such an assessment without a notice to and a hearing, or an opportunity for a hearing by the owners of the property to be assessed."

Stuart vs Palmer, 74 N. Y., 183-188.

"Therefore, in reference to the imposition of these assessments as in reference to the imposition of other assessments and taxes, the lot owners were entitled at some stage of the proceedings to a notice and an opportunity to be heard, and unless the law gives them the right to notice and opportunity to be heard before the board which was authorized to impose the assessments, it was unconstitutional and void for the reason stated in *Stewart vs. Palmer 74 N. Y., 183.* * * * The rules laid down in *Stewart vs. Palmer*, are salutary and important, and for the protection of personal rights and private property must be enforced in all cases to which they are applicable."

Rensom vs. Wheeler, 105 N. Y., 573-579.

"When the public questions are settled, and the tax comes to be apportioned, a personal liability of the individual and a lien upon his property are initiated. He has right, then, to be heard upon all questions which affect and determine that liability."

Re Trustees of Union College, 129 N. Y., 308-313.

"It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power, is a quasi-judicial proceeding, which cannot take final effect unless persons to be assessed have an opportunity to be heard."

Sears vs. Street Com'rs, 173 Mass., 350, 355.

"It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice at some stage in the proceeding, and that it afford the owner an opportunity to be heard concerning the legality of the assessment, before some tribunal or body authorized to correct errors or give proper relief, before the property is taken or the charge made absolute."

Garvin vs. Danssman, 114 Ind., 429, 432.

"Property-owners affected by an improvement within a taxing district, are entitled to a hearing on the question of special benefits."

Adams vs. City of Shelbyville, 57 N. E. Rep., (Ind.) 114, 118

"Before special taxes can be made a fixed and permanent charge upon the property of individuals, the owners must have notice thereof, with an opportunity to be heard and an opportunity to contest their validity and fairness."

Gilmore vs. Hertig, 33 Kas., 156, 169.

"Our conclusion is that because of the want of any provision for a notice in either the statute of the city or ordinances or resolutions of the council, and the want of any opportunity for a hearing, these assessments must be held to be invalid * * * * * (724). Aside from authorities which ought to be absolutely conclusive upon the question, there can be no doubt that the ruling is founded upon the plainest principles of justice. The arbitrary appropriation of private property without notice, and without an opportunity for a hearing, cannot be defended upon any principle of natural justice, and ought not to be tolerated and upheld by the courts."

Gatch vs. City of Des Moines, Ia., 718, 722.

"The doctrine of the authorities is that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to or which may be made the basis of taking it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise, at some stage of it and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed, must be given, otherwise the constitutional guarantees above cited are infringed."

Brown vs. City of Denver, 7 Col., 305.

"No provision is made anywhere in the statute for any hearing by the land owner, whose land is to be charged. No notice is to be given him when the board of trustees is to levy the assessment, and if he appears when such assessment is to be levied by the board of trustees, no hearing by the board is provided for in the act. The collection provided for is summary and without suit brought at which the property owner can be heard. The assessment is by the terms of the act made an absolute lien on his property, without any provision or opportunity allowed him to show its illegality or unconstitutionality. For these reasons we are of the opinion, according to well settled rules, that the act is unconstitutional and the assessment and sale under it cannot be valid."

Hutson vs. Woodbridge, 79 Cal., 90, 94.

V.

It would seem to follow from the principles established in the foregoing cases, that any law which requires the cost of paving to be arbitrarily assessed upon the abutting property, without reference to the benefits, is in violation of the constitution and void.

But the plaintiffs in error, while admitting that special assessments are based upon benefits accruing to the property, maintain that it is within the power of the legislature to determine the district benefited by an improvement, the amount to be assessed upon the property, and the method of apportioning the same, and that such legislative determination is conclusive, and cite authorities where the doctrine is stated as follows:

"The power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled except as it may be limited or restrained by constitutional provisions * * * * The legislature judges finally and conclusively upon all questions of policy, as it may also upon all questions of fact which are involved in the determination of a taxing district."

Cooley on Taxation, 149, 150.

This doctrine originated in New York, where the first case which we have been able to find in which a special assessment was sustained, was *People vs. Mayor of Brooklyn*, 4 N. Y., 419, decided in 1851, where the court say, (page 426):

"It must be conceded that the power of taxation and of apportioning taxation, and of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing, and the power of apportioning taxation, are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is therefore unlimited unless it be restrained as a part of the power of taxation. There is not, and since the original organization of the state government, there has not been any such constitutional limitation or restraint." * * * *

This case was followed by *People vs. Lawrence*, 41 N. Y., 127, decided in 1869 where the court say, (page 141):

"The settled principles to be deduced from these cases are that the sovereign power of taxation is lodged in the legislature; that the power of taxing and the power of apportioning taxation are identical and inseparable; that there is no constitutional restraint upon the exercise of this power; that the right of determining what portion of the public burdens by way of taxation shall be borne by any individual, or class of individuals, must

be determined by the legislature; that however much this power may be abused by the legislature, the only check upon it is the responsibility of the legislative body to its constituents. As taxation is indisputably a legislative power, and as the constitution contains no restriction upon the taxing power of the legislature, redress against unjust taxation must be sought in the same way, and no other, as redress against unjust and oppressive legislation in the general enactment of laws is sought. The judicial department of the government can afford no redress in such cases."

The absurdity of this doctrine is shown by its logical application by the courts to cases where it amounts to a confiscation of the property.

In a case where the law required the assessment to be made according to the front foot, the court say: "The lot against which this assessment was filed consists of a long, narrow strip, with a front of several hundred feet upon the street, and only thirty-one feet deep at one end and narrowing to the other. The lot is said not to be worth the amount of the assessment against it. If this be so, it does not affect the validity of the law under which the assessment was filed."

Harrisburg vs. McCormick, 129 Pa., 213.
Terry vs. City of Hartford, 39 Conn., 291.

These are the leading cases which are cited by Judge Cooley in his work on taxation, and are the foundation of all subsequent cases which sustain the doctrine advocated by appellants; it is only upon this doctrine that the arbitrary assessment of benefits by frontage and area can be sustained; and all the cases which are cited by plaintiffs in error, or which we have been able to find in which such arbitrary assessments have been sustained, the basis of this decision is the doctrine of the absolute power of the legislature to finally decide those questions

If the legislature has this power, then the courts cannot interfere upon any pretext or pass upon the justice, equity or reasonableness of the legislative decision, no matter how inequitable or arbitrary it may be, or how much it may violate the constitutional rights of the taxpayer. It will be observed that in order to sustain these assessments the doctrine, as stated, must be maintained to its full extent, for the decision of this question, as we have said, depends upon the power of the legislature, and unless the legislature has the power to the extent claimed by appellants, such assessment cannot be maintained.

This being a question of legislative power, if it appears that this power is limited in any respect, then the doctrine that the acts of the legislature are conclusive necessarily falls, and the validity of all of the acts of the legislature in regard to special assessments are open to question by the taxpayer; so that this case resolves itself finally to the one question of the power of the legislature.

Ever since the independence of the United States, there has existed a marked division of opinion as to the relative powers of the legislature and judiciary. At the time of the Revolution, and for a long time thereafter, the idea prevailed that the legislature was endowed with all the powers of parliament, and no consideration seems to have been given to the difference between the powers of parliament and the powers of a legislature under a written constitution.

The early doctrine in the United States is illustrated by a decision of the Supreme Court of New York, rendered in 1784, where the court say: "The supremacy of the legislature can not be called into question. If they think fit positively to enact a law, there is no power which can control them. When the main object of such act is clearly expressed, and the intention is manifest, the judges are not at liberty, although it appears to them to be unreasonable, to reject them, for this were to set the judicial above the legislative, which would be subversive of all government."

Rutgers vs. Waddington, Coxe's Ind. Power, 223

It was not until 1803 that the power of the judiciary to declare statutes unconstitutional, was finally settled by a decision of the supreme Court of the United States.

Marbury vs. Madison, 1 Cranch., 137.

It was not until long afterwards that the doctrine was applied to any statutes, except such as encroached upon the judicial power, and as late as 1825, Judge Gibson, in the case of *Eakin vs. Raub*, 12 S. & R., (Pa.,) 330, in a dissenting opinion, denied the power of the judiciary to hold statutes unconstitutional.

The early cases sustaining special assessments were expressly based upon the unlimited power of the legislature, and were evidently the outgrowth of this doctrine, but since that time, and particularly within the last thirty years, it has become firmly established that under a written constitution, the power of the legislature is limited by the provisions of both the federal and state constitutions, and that it is always within the power of the judiciary to decide when, and to what extent the act transcends the power of the legislature.

It will be observed by an analysis of the cases cited, that as the constitutional rights of the citizen have been more fully recognized, the exercise of arbitrary power by the legislature over the property of the citizen has been narrowed from year to year, until such power can hardly be said to exist at the present time, and this is true, not only in regard to general legislation, but in regard to the power of taxation, both general and special.

VI.

Taxes, whether general or special, can only be levied for public purposes, and while the legislature may determine for itself whether a given purpose is or is not public, such determination is not conclusive, and the taxpayer always has a right to contest the matter, and if it is made to appear that the purpose of the tax is not public, the right of the individual is clear.

"The legislature must consequently determine for itself in every instance, whether a particular purpose is or is not one which so far concerns the public as to render taxation admissible, but it is generally admitted that the legislative determination on this subject is not absolutely conclusive. It may be sufficiently so to put the administrative machinery of the state in motion, but when the exaction is made of an individual and the power of the state is made use of to compel submission, he has always a right to invoke the protection of the law, and an appeal to the law for protection of individual property must necessarily render the question which lies at the foundation of the demand a judicial question upon which the courts cannot refuse to pass judgment * * * * * (104). In attempting to exercise the right in any particular case, the legislature merely asserts its jurisdiction to act, but questions of jurisdiction are not usually concluded by a decision in its favor, made by the party claiming it; they necessarily remain open and may be disputed anywhere * * * When, therefore, the question of the validity of taxation becomes judicial, if it shall appear that the exaction is made for a purpose not public, the right of the individual to protection is clear. Such an exaction is not within the competency of the legislative power, and the attempt to enforce it, however honestly made, could only be an attempt to take property from its possessor under an authority which the law of the land does not recognize."

Cooley on Taxation, 103.

"We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never place it on the ground of the unlimited power in the state legislature to tax the people, but concede that where the purpose for which the tax is to be assessed could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power and was an authorized invasion of private rights. It must be conceded that there are such rights in every free government, beyond the control of the state. A government which recognizes no such rights, which holds the lives, liberty and property of its citizens

subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism."

Loan Association vs. Topeka, 20 Wall., 655.

"To promote a public purpose by tax levied upon the property in the state, is within the power of the legislature, but the legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise, even though the private enterprise might benefit the local public in a remote or collateral way. Legislative power of taxation is not illimitable."

People vs. Parks, 58 Cal., 624. 639.

"Two propositions may be considered settled: First, that taxation to be sustained must be for a public purpose."

State vs. Osawkee Tp., 14 Kas., 418, 420.

"The legislature has not the power to so determine that a use is a public use as to make the determination conclusive. The attempt of the legislature to exercise the right of eminent domain does not settle that it has the right, but the existence of the right in the legislature in any class of cases, is left to be determined under the constitution by the courts."

Allen vs. Inhabitants of Jay, 60 Me., 124, 139.

In *Weismer vs. Village of Douglas*, 64 N. Y., 91, which was a suit to restrain the collection of bonds of the village issued in payment of capital stock in a manufacturing company, it was held that the legislature had no power to conclusively determine that the object of a tax was for a public purpose, and the tax was held void.

In *Jenkins vs. Andover*, 103 Mass., 94, and *Curtis vs. Whipple*, 24 Wis., 350, it was held that statutes authorizing cities to raise by taxation and appropriate money to aid in private schools, were beyond the power of the legislature and unconstitutional and void.

VII.

The tax must pertain to the district taxed, if it does not, the legislature must be held to have assumed an authority not conferred in the general grant of the legislative power, and it is, therefore, unconstitutional and void.

"If the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general

purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would inure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax, we cannot doubt that the imposition of it would be an unlawful exercise of power, not warranted by the constitution, against the exercise of which a person aggrieved might sue for protection. And it is no more incompetent to select classes of persons for exceptional burdens than it is to select districts of the state for that purpose."

Cooley on Taxation, 141.

"It is generally agreed, if not universally conceded, that the legislature cannot impose upon the persons residing in a particular locality or portion of the territory, a tax for the benefit of the whole state, nor on a borough or township for the benefit of a county, any more than upon a single individual."

Durach's Appeal, 62 Pa. St., 491, 494.

"It is perfectly true that it would be held beyond the scope of legislative power to authorize a municipality to levy a local tax for general purposes. The burdens of the whole community cannot be shifted to the shoulders of one man who has only an interest in common with all the rest."

McCormick vs. Patchin, 53 Mo., 33, 36.

In a case of a special assessment for constructing and maintaining a boulevard, it was held that such repair and maintenance was not a local improvement, the Court say, (page 354:) "We entertain no doubt that in the passage of this statute the general assembly exceeded its constitutional power. The act is, therefore, void, and conferred no power upon the commissioners to levy the tax in question, and the circuit court should for that reason have enjoined its collection."

Crane vs. West Chicago Park Com'rs, 153 Ill., 348.

In *Smith vs. Sherry*, 50 Wis., 210, it was held that an act annexing territory to a village not contiguous to or adjoining it, and thereby subjecting such separate territory to the payment of village taxes, was unconstitutional and void.

In *Wells vs. City of Weston*, 22 Mo., 384, where the statute had authorized the city of Weston to assess a tax on all real estate outside of and adjoining the corporation to a distance of one half mile, and suit was brought to set a ide a tax assessed under the charter, the court held that the legislature had no authority to confer such power on the city.

The principles established by the foregoing authority which apply equally to general taxes and special assessments, are summarized as follows:

"When, therefore, the legislature assumes to impose a pecuniary burden upon the citizen in the form of a tax, two questions may always be raised; first, whether the purpose of such burden may properly be considered public on any of the grounds above indicated; and second, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative the legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is therefore unconstitutional and void."

Cooley Const. Lim., 611.

VIII.

The legislature cannot pass conclusive rules of evidence, so as to make the showing by one party to a controversy, whether the public or a private citizen, conclusive of the truth of the facts shown.

"The legislature cannot pass conclusive rules of evidence; that is to say, it cannot make the showing by one party to a controversy conclusive of the truth of the facts shown, thus in effect denying to the other party a hearing. Its power over the rules of evidence is the power to shape and mould for the purposes of justice the rules under which parties are to make a showing of their rights, and not the power to preclude their showing them. * * * A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void because not a law regulating evidence, but an unconstitutional confiscation of property. The case supposed is but an illustration of the general rule which applies as well to all the necessary and jurisdictional steps leading up to the deed. The law of the land requires that every party should have an opportunity for a trial of such rights as he claims, and there can be no trial if only one party is suffered to produce his proofs."

Cooley on Taxation, page 298.

In *Zeigler vs. Southern & Northern Ala. Ry. Co.*, 58 Ala., 594, the Court say, (page 599:) "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense, to be heard

by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

"A legislature has no power to find facts by legislative enactment so as to be evidence in suits againsts persons who are not applicants for the act."

Lothrop vs. Steadman, 42 Conn., 583, 592.

IX.

The legislature cannot arbitrarily fix the valuation of property for assessment, or determine the amount of tax to be levied, or the amount of a special assessment to be levied upon a district for a local improvement.

"The legislature cannot make the valuation of property for taxation."

Cooley on Taxation, 410.

"The legislature can no more impose an assessment for which property can be taken and sold than it can render a judgment."

Harris' Am. Con. Law, 315.

MR. JUSTICE FIELD:

"There is something repugnant to all principles of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording him an opportunity to be heard respecting the correctness of their action. * * * The legislature can no more arbitrarily impose an assessment for which property can be taken and sold, than it can render a judgment against a person without a hearing."

San Mateo vs. So. Pac. R. R. Co., 13 Fed. Rep'r, 722, 752.

"Suppose the legislature should pass a law authorizing the taking of private property for public use, and should in the same act fix the compensation which they supposed to be just to be paid for it, no one would contend that the legislature was competent to determine by law what would be a just compensation for the property taken. The action of the legislature to this extent would be held arbitrary and unconstitutional. Nor could the legislature or a corporation, either by law or an ordinance, declare the value of property or what would be a just

assessment upon it, so as to make the assessment uniform and equal in value, and for a like reason a relative estimate of benefit and burden by law. Such assessment and valuation is essentially a matter of fact to be ascertained by evidence and not by law."

Peay vs. Little Rock, 32 Ark., 31, 39.

"The jury are required to assess one-half upon the assessment district, regardless of whether it is benefited to that extent, and are clothed with power to assess a larger amount only when they conclude that the benefit exceeds fifty per cent. The legislature has power to fix an arbitrary percentage of a public improvement to be imposed upon a local assessment district, regardless of the benefits received."

Detroit vs Judge of Recorder's Court 122 Mich., 588-589.

"When the public questions are setled, and the tax comes to be apportioned, a personal liability of the individual and the lien upon his property are initiated, and he has a right then to be heard upon all the questions which affect and determine that liability. His right is to pay no more than his just proportion, and the legislature cannot arbitrarily determine the amount, refusing to the person assessed a reasonable opportunity to be heard."

Re Trustees Union College, 125 N. Y., 308.

"The charter contains no provision whatever under which benefits to the property against which an asessment is ordered may be ascertained or even considered. The council arbitrarily and many years in advance determine and declare what amount should be assesed against defendant's property whenever a sewer should be constructed in the street upon which it fronted. The charter authorizes this method, and none other, except at the option of the council the first plan may be adopted. Of course, the amount to be assessed per lineal foot of frontage might be increased not to exceed a total of four dollars per foot, or might be decreased at the will of the council, but at no time was this body obliged to consider or ascertain benefits. No plan of assessment can be upheld which will permit such an outrageous departure from the principles of uniformity and equality in taxation embodied in the constitution as will this one now being considered."

Minnesota vs. Pillsbury, N. W Rep., (decided Feby. 6, 1901.)

In *Brady vs. King*, 53 Cal., 44, where the legislature had passed a curative act declaring an assessment valid, the act of the legislature was an attempt to levy a contribution within a certain district and to declarre that each lot named in the or-

iginal roll should pay a sum arbitrarily fixed. This would be to create a lien on defendant's real estate which, if the law were valid, the courts would be compelled to endorse. If this can be done, the legislature may take the property of a citizen without any legal process, for there is no difference between taking the property directly and imposing a lien upon it: but no person can be deprived of life, liberty or property without due process of law."

In *Johnson vs. Milwaukee*, 40 Wis., 315, which was an action brought to enjoin a special assessment on a lot for improving the water front, the court, after discussing the facts and the manner in which the assessment was made, say, (page 327): "We prefer to rest the invalidity of the assessment in this case upon the ground that the Commissioner of Public Works based the assessment upon cost instead of the actual benefits positively and specially accruing to the property assessed in consequence of the improvement."

X.

The proceedings to ascertain and fix the amount of benefits in any particular instance involves an inquiry into the facts that cannot be duly ascertained without the production of witnesses and the consideration of their testimony, as well as the consideration of all the facts and circumstances surrounding each improvement. This is a judicial act, and transcends the legislative province, which is to lay down rules and not to determine what persons or things are within their scope.

"Wherever the principle is adopted that assessments for local improvement can be justified only to the extent of special benefits actually received, and must be apportioned accordingly, * * * * the question of the existence and extent of benefit becomes in its nature judicial."

Dillon's Mun. Cor., 802a.

"Whatever the rule may be when a tax is general and will presumably be compensated by the appropriation of the proceeds, there can be little doubt that local taxation, depending for its constitutionality on the existence of some special benefit and to be apportioned according to the advantage so conferred, should be based on an assessment not made legislatively but through some proceeding in accordance with the immutable principle that no man shall be injured in his person or estate without a hearing. Such taxation not only involves an inquiry into facts that cannot be duly ascertained without the production of witnesses and the argumentative consideration of their

testimony, that would seriously embarrass and delay legislation, but transcends the legislative province which is to lay down rules and not determine what things or persons are in their scope, and is at variance with the constitutional distribution of functions of government among its several branches, which operates as an implied restraint on each, even when their authority is absolute as a whole.".

Hare's Am. Court Law, 312.

"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property."

Ragan vs. Farmers' Loan & Tr. Co., 154 U. S., 399.

"Whenever an act undertakes to determine a question of right, of obligation or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

The Sinking Fund Cases, 99 U. S., 700, 701.

"The constitution of this state has not committed to the legislature a power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property for non-payment of taxes. Such determination belongs to the judiciary."

Larson vs. Dicky, 39 Neb., 463, 471.

Where the question was as to the nature of the function determining the existence and extent of special benefits, the court say:

"It is in fact a judicial inquiry, and should be proceeded with as such. * * * The determination of what constitutes a benefit, and its valuation, says Mr. Sedgewick, are judicial acts which do not pertain to the legislative function."

Norfolk vs. Ellis, 26 Gratt., 242.

"The citizen cannot be deprived of his property by involuntary divestiture of his right to it, or by such transfer of it to another, except by a judgment of law, and the legislature having no judicial power cannot impart to their enactments the force of a judicial determination. The legislative power extends only to the making of laws, and in its exercise is limited and restrained by the paramount authority of the state and federal constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another without trial and judgment in the courts, for to do

so would be the exercise of a power which belongs to another branch of the government and is forbidden to the legislative."

Newland vs. Marsh, 19 Ill., 376, 382.

"Whether the act authorizing a local assessment for a local improvement contains such an express recital or declaration or not, it is open to any one aggrieved to impeach it as a violation of his private right, if it can be made clearly to appear that the object proposed is not in fact one in which the public has an interest, and that the assessment has been made upon persons who have not consented to it and are not benefited by the improvement, or that the assessment exceeds the estimated benefit. In all such cases the act is in effect the taking of one man's property for the benefit of another, and beyond the constitutional power of the legislature. The courts are bound to declare such an act void."

Brown vs. Keener, 74 N. C., 714.

In *Tyson vs. School Directors*, 51 Pa. St., 9, where the legislature passed an act authorizing the raising of money to reimburse moneys advanced to save the people of the township from drafting, the court say (page 22:)

"Such an enactment would not be legislation at all; it would be in the nature of judicial action, it is true, but wanting the justice of notice to parties to be affected by the hearing, trial, and all that gives sanction and force to regular judicial proceedings. It would much more resemble an imperial rescript than constitutional legislation; first, in declaring an obligation when none was created or previously existed, and next, in decreeing payment by directing the money or property of the people to be sequestered to make the payment. The legislature can exercise no such despotic functions."

XI.

The prohibition contained in the fourteenth amendment to the Constitution of the United States, "nor shall any state deprive any person of life, liberty or property without due process of law," is a limitation upon the powers of the legislature in taxation as well as in all other respects.

"It must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever, by virtue of public position under a state government, deprives another of any right protected by this amendment against the deprivation by the state, 'violates the constitutional inhibition, and as he acts in the name and for the state, and is

clothed with the state's power, his act is that of the state.' This must be so or, as we have often said, the constitutional prohibition has no meaning."

Chicago, Burlington Ry. vs. Chicago, 166 U. S., 226, 233.

FIELD, J.: "There being, then, no provision of law giving to the company notice of the action of the state board and an opportunity respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to me there can be but one answer to these questions. * * * * (751) The provision in this amendment is in the form of an interdict upon the states, 'nor shall any state deprive any person of life, liberty or property without due process of law,' and by due process is meant one which following the forms of law is appropriate to the case and just to the practice to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adopted to the end to be attained, and it must give to the party to be affected an opportunity to be heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding it would be anything but due process of law."

San Mateo vs. So. Pac. Ry. Co., 13 Fed. R., 722, 750. 751.

JUDGE STORY: "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurks under any general grant of legislative authority or ought to be implied from any general expressions of the will of the people."

Wilkinson vs. Leland, 2 Pet., 627, 657.

"No matter under what form the power is professedly exercised, whether it be in the form of laying or authorizing a tax, or in the regulation of local divisions or boundaries, which result in a subjection to local taxes, and whether the operation be to appropriate the property of one or more individuals without their consenting to the use of the general or local public, or to the use of other private individuals or of a single individual, the case must be regarded as coming within the prohibition contained in this clause of the constitution is impotent for the protection of individual rights of property from any aggression, however flagrant, which may be made upon them, provided it

be done under color of some recognized power. We are not prepared to concede that it is thus impotent."

Cheanay vs. Hoosier, 9 B. Mon., 330.

XII.

The legislature cannot fix, or authorize the municipality to fix an arbitrary basis for an assessment to be imposed upon the property without regard to benefits, and any law which requires or permits the municipal authorities to assess the whole or any specified part of the cost of an improvement upon property in a district, without giving to the taxpayer the right to contest the amount of his benefits, deprives the taxpayer ot his property without due process of law.

"Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for an apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in an apportionment of public burdens extended this far, and such legislation is still upheld in most of the states; but, since the period when the express provision has been made in many of the state constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement, or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessment can justly rest, and that any other rule is unequal, oppressive and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted, what must upon principle, be regarded as a just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited, and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

2nd. Dillon's Mun. Cor., Sec. 761.

"The question upon which we expressly doubt is whether, considering the question solely on principle, the legislature can

arbitrarily decide or invest local officers with the authority to arbitrarily decide what property is benefited by the improvement * * * * * For our part we very much doubt whether in any case the right to arbitrary decision by the legislature can be defended on strict principle, and we cannot forbear suggesting that the judiciary ought not, and in truth cannot, surrender its power to decide questions affecting the right to impose special burdens on private property. The matter of levying taxes for general revenue is exclusively legislative, and is fettered only by the limitation of the constitution; whereas the legislative power to exact a special tax from the property owner rests upon the fact that there is a betterment of his property to the extent of the cost of the improvement."

Elliott on Streets, 392.

"The cost of a public work can be imposed on particular classes or localities so far only as the benefit which they receive exceeds that derived by the rest of the community, which should be ascertained by some proper means and cannot be arbitrarily determined by the legislature nor without an opportunity for the parties interested to be heard in their own behalf. * * * * The legislature may declare that land or that chattels shall be taxed, and according to what rate, and no power short of popular will can reverse the decree; but if they go further and charge individuals or classes without providing some proper means of ascertaining whether they are in fact liable, the attempt will contravene the principle that no man should be deprived of any valuable right without a hearing, and may be frustrated by the judiciary. It may accordingly be regarded as established that taxation implies such an apportionment as will distribute the burden equally among all persons in like case, and that the legislature can no more make an assessment under which property may be taken and sold than it could render a decree that might be attended by the same result. * * *

* * * "Taxation and asaessment imply apportionment. Each person must share the burden of taxation and assessment equally with all others in like manner. It must be conceded that property cannot be taken by the right of eminent domain without some notice to the owner or some opportunity on the part of the owner at some stage of the proceeding to be heard as to the compensation to be awarded him. An act of the legislature arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that 'due process of law' which both the federal and state constitutions guarantee to every citizen. Can it be that when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such com-

pensation to their entire value, without any opportunity on the part of the owners to be heard?"

Hare's Am. Const. Law, 310, 312 315.

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exercising the power of taxation, may not go, consistent with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. but the guaranties for the protection of private property would be seriously impaired if it were estabished as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."

Norwood vs. Baker, 172 U. S., 269, 278.

Where the statute required the assessable cost to be apportioned to each parcel in proportion to the number of front feet, the court says: "It is now settled law in this court, as it is in the supreme court of the United States and in many other courts, that after the construction of a public improvement, a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits and be apportioned to the benefits. So far as there is anything in the earlier cases which seems at variance with this doctrine, it is controlled by the later decisions. * * * In determining whether a statute is unconstitutional, the question is not whether the result is harmful in a particular case, but whether the stat-

ute according to its terms will violate the provisions of the constitution in its application to cases which may be expected to arise."

Dexter vs. Boston, 57 N. E. R., (Mass.,) 379.

"We recognize the binding force of the decision of the Supreme Court of the United States upon this question, but we the more readily apply it because we endorse it as a timely and just announcement of the superiority of constitutional guaranty over a rule of law established by the courts. * * * Norwood *vs.* Baker establishes the following propositions which are applicable to the case at bar: 1. The legislature of a state cannot authorize a municipal corporation to assess upon abutting property the cost of a public improvement in a sum materially exceeding the special benefits which that property may derive from the work?"

Hutchinson vs. Storrie, 92 Tex., 685, 691, 692.

Where a bill was filed to enjoin the defendant from collecting an assessment for paving according to foot front, Hadley, Chief Justic, says: "While the facts in the Norwood-Baker case are unusual and distinguishable from the facts in the case at bar, yet it cannot be successfully denied that the general doctrine laid down is to the effect that the imposition of assessments for local improvements per foot front irrespective of the question of accruing benefits, is in violation of the Fourteenth Amendment to the Federal Constitution, and that the case has been so construed generally by the courts of the country. * * * The judgment of the Federal Supreme Court defining the limits of legislative power sanctioned by the Federal Constitution is the supreme law of the land. It commands state courts as well as state legislatures. The duty thus imposed is agreeable, as being in accordance with our sense of just principles and as furnishing the only reasonable foundation for the exercise of the taxing power in respect to special assessments."

Adams vs. Shelbyville, 57 N. E. R., (Ind.) 114.

"The stake driven by the decision in *Norwood vs. Baker* is timely. Judicial expression on the subject was indefinite. There was a tendency to lose sight of the equitable basis which justifies assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final without regard to its justice. It is to be hoped that the highest court of the land has spoken finally and will not recede from its position. For the reason that the statute in question embraces an arbitrary system of taxation without regard to benefits, provides for no method of determining the question of benefits, and no opportunity to be heard in reference thereto, and for the reason that from the face of the act it appears that the legislature in its adoption and passage did not consider or take into account the benefit to accrue to the

property upon which such assessment was levied, we hold that the statute is invalid, because it is in effect a taking of private property under the guise of taxation without just compensation and without due process of law."

County of Ramsey vs. Lewis, (N. W. Reporter, decided February 7th, 1901.)

"The legislature cannot fix or authorize the governing body of the municipality to fix an arbitrary basis for an assessment to be imposed upon property without regard to benefits. If this be done, the principle which justifies special assessments abutting property, viz: that it is thereby specially and peculiarly benefited, is wholly ignored, the result being that under the guise of taxation the owner is deprived of his property without just compensation and for the use of the public."

Minnesota vs. Pillsbury, (N. W. Rep., decided Feb. 6th, 1901,)

The principles established in the decision of *Norwood vs. Baker* have been applied to assessments for paving under statutes requiring the assessment to be made by the front foot similar to the one in the case at bar, in the following cases in the Circuit Courts of the United States, to which we refer, while not including them in our brief:

Fay vs. Springfield, 94 Fed. R., 409, (W. D. of Missouri.)

Charles vs. City of Marion, 100 Fed. R., 538 (District of Ind.)

Lyon vs. Tonawanda, 98 Fed. R., 361, (N. D. of N. Y.)

Cowley vs. Spokane, 99 Fed. R., 840, (E. D. of Wash.)

Biddle vs. Huff, 103 Fed. R., 362, (S. D. of Ga.)

"The identical question arising on the record now before us has been passed on by this court on several occasions, but is now presented distinctively as a federal question. * * * (592) Due process of law is not confined to judicial proceedings. The article of the constitution is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the legislature free to make any process due process of law by its mere will and pleasure. * * * * There would seem to be no doubt that notice in all such cases as the present is required to constitute due process of law, and is essential to the validity of the assessment. * * * * * (594) As we have seen, section 34 of article 47 of the city code, is a general ordinance which provides in all cases of grading and paving streets that the whole cost shall be borne by the abutting owners in proportion to the number of front feet owned by them respectively. Nothing could be more arbitrary than this.

The cost is apportioned in advance without any reference whatever to the value of the property, but solely with regard to the number of front feet, by which rule the heaviest amount may fall on the least valuable property, and the lightest on the most valuable. * * * * The property holders are condemned to pay what is exacted of them without having been afforded an opportunity to be heard in their own defense at all. Why should the citizen not be allowed to contest the fairness and equality of the front foot rule, or any other rule adopted by the city, when one of the very conditions upon which, as we have seen, the constitutionality of the measure depends is that the owner shall have the right to be heard 'upon the question what proportion of the tax shall be assessed upon his land.' The right to direct the imposition of such special tax upon such property rests upon the theory of the special benefits accruing to the particular property from the proposed improvement."

Ullman vs. Mayor, 72 Md., 587, 588.

"No one will question the right of the City of Trenton, under legislative authority, to grade, pave and sewer streets, and include the expense in the general tax levy, while an attempt to impose the cost of such work in excess of any special benefits actually conferred upon a taxing district less than the political district of which it is a part, would be instantly arrested by an appeal to the appropriate judicial tribunal. The reason upon which this well-settled doctrine in this state is rested is that it would be a violation of our constitutional provision 'that private property shall not be taken for public use without just compensation.' In other states arbitrary exactions of this character have been sanctioned on the ground that the principle upon which taxation is founded is that the taxpayer is supposed to receive just compensation in the benefits conferred by the government under which he lives, and that the law-maker is the sole judge as to whether the benefits received are commensurate with the burdens imposed. Upon this theory, in *People vs. Lawrence*, 41 N. Y., 123, the cost of paying a railway company for relinquishing their right to use steam in the city, with the cost of closing their tunnel and grading the street over it, was laid without reference to actual benefits upon specified property in the vicinity of the improvement. To justify this conclusion, the court declared that the right of determining what portion of the public burden by way of taxation shall be borne by any individual or class of individuals, is in the legislature absolute, and however much abused, can be redressed only by a legislative enactment. This is an assertion of power little, if any, less than despotism wields over the property of its subject (582) To the extent that a locality is peculiarly benefited, the legislature may, at will, declare it to be a special taxing district for the purpose of bearing the burden, and provide a way in which such benefits shall be computed and

levied, but to impose upon A, because he chances to reside upon a certain street where the work is done or the expense incurred, so much of the cost as inures to the public benefit, in which he has no greater interest than any other citizen, would violate established principles as clearly as if the expenditure had been incurred in a part of the township remote from him. The existence of such power can be maintained only by asserting that the law-maker is a final arbiter who is to determine whether the individual citizen derives such benefit from any given measure as would justify the burden cast upon him, a doctrine which has hitherto found no countenance in our courts. (583) While it is thus clear that the burden of a particular tax may be placed exclusively on any political district to whose benefit such tax is to inure, it seems to be equally clear that when such burden is sought to be imposed upon particular lands not in themselves constituting a political subdivision of the state, we approach the line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert with the least show of reason that the legislative right to select the subject of taxation is unlimited."

State vs. Fuller, 39 N. J. L., 576, 579, 583.

"If there be such a flagrant and palpable departure from equity in the burden imposed, if it be imposed for the benefit of others or for purposes in which those objecting have no interest and are therefore not bound to contribute, it does not matter in what form the power is exercised, whether in the unequal levy of a tax, or in the regulation of the boundaries of the local government which results in subjecting a party unjustly to local taxes, it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression, however made, and whether under the color of recognized power or not."

Morford vs. Unger, 8 Ia., 82, 92.

"That the ordinance also fails to meet the rule of equality and justice as expounded by this court in the cases cited. It compels the assessor to assess the whole expense of the improvement on the property benefited so that the general fund shall bear no part of it, even though the individual property might not be specially benefited to the extent of the cost of the improvement. It assumes there must be lots which will be specially benefited to an amount equal to the whole cost of the improvement, while it may even occur that such is not the case, and under this assumption compels the assessor to find that the property is so benefited, or, in other words, to assess the whole expense upon property benefited. This violates the rule that the assessment shall be made upon the property specially benefited."

St. John vs. E. St. Louis, 50 Ill., 92, 96.

"It is fortunate for the rights of the people when a case occurs causing the courts to pause and retrace the boundaries of delegated power. Thus the stealthy steps of invasion may be detected and the power denied ere it be too late, and the precedent become fixed beyond judicial control. This is such a case. The attempt is to apply here the frontage rule of valuation of compact city lots to a rural population, and make farm property and town lots indiscriminately pay for an expensively paved city highway under the name of a street running far out into the country. The assumption is that by the addition of extensive rural districts to a city, the whole surface is brought by the legislative power within the sway of city taxation for municipal purposes, and cases are cited of local or special taxation for local purposes as justifying this stretch of power. But seeming analogies must not be allowed to lead our minds astray. Fortunately this subject has been examined in several recent cases leading to a fuller development of the principles at the foundation of this power. (Citations.) In the early cases the mode of determining the benefits to pay the damages and costs of construction was by actual view and assessment. (Citations.) In none of these cases was there a close examination of the per foot front rule, but it seems to have been assumed as a convenient approximation where the property fronting on the street was of a kind and not differing much in value, but in Washington avenue it is shown that this mode of valuation is but a substitute for actual assessment. * * * * (365) That the benefits a property owner receives from an improvement can be ascertained only by a reasonable mode of assessment is plain, and that to measure the fronts of all the abutting property and divide the cost by an equal charge per foot front upon each, is not an assessment of advantages, but simply an arbitrary mode of charging, is equally plain. * * * (367) A fixed sum to be paid per foot without regard to the character of the value or extent of the property is an exaction, not a just assessment according to benefits."

Seely vs. Pittsburg, 82 Pa. St., 360, 364.

"The judgment in the Seely case, in view of the facts, must be admitted to be right by all, except those who ascribe a practically omnipotence to the legislative power in such matters—a view which overlooks the substantial difference between general taxation and the imposing of a special burden upon particular property, irrespective of political or municipal districts.

2 Dill., Mun. Corp., Sec. 762.

When an assessment for the improvement of a highway running through a country district, the court say, (page 587:) "While districts may be created and taxation imposed according to the value of the property within the particular district

for the construction of turnpikes and other improvements upon the idea of benefits derived, we are aware of no rule or principle of taxation that would authorize the taxation of agricultural lands by the square foot, or of compelling those who own land bordering on an ordinary country road to incur the entire expense of keeping the road in repair, and certainly no system exists by which such extraordinary expenditures can be made as in this case, imposing a burden of fifty dollars an acre on agricultural land for the construction of an improvement, for no other reason than that the land borders upon the improvement made. The road is devoted to the public use; it is an improvement in which the whole public is interested and where the owners of the adjacent land, although not touching the road, are equally benefited with those living directly upon it. The few living adjacent to the improvement have been selected to discharge a burden that should be assumed by all, or at least by those who are benefited by it. It is a local tax for a county purpose, a common burden imposed on a few, that violates every principle of just and uniform taxation and borders on spoilation * * * * The burden may be apportioned according to the benefits received, whether it be a county or district tax, but such an unjust designation as has been made in this case, and that would exist if a like system had been adopted for the entire county, is in direct violation of the constitution, and an appropriation of the property of the citizen for public use without just compensation. Local taxation is often proper because of the local benefits received. * * * But to say that a few persons living on a road shall pay twenty-thousand dollars for improving it, and then have no other interest in it than his neighbor who rides over it and uses it, is so obviously unjust as to require only the statement to show that it is in plain disregard of the rights of these appellants. It may be called a taxing district, but this imparts no efficacy to such legislation where the district, when created, shows that the burden is imposed on a few for the benefit of all. In this consists the wrong done these appellants, and entitles them to the relief sought."

Graham vs. Conger, 85 Ky., 582.

"The commissioners were to ascertain what land within the district of assessment was benefited, and then to apportion and assess the said sum upon such land in proportion to benefits. The assessment when made was declared to be a lien upon the land, and its payment could be enforced by a sale thereof. I am of opinion that the constitution sanctions no law imposing such an assessment without a notice to and a hearing or an opportunity for a hearing by the owner of the property to be assessed. * * * It matters not, upon the question of the constitutionality of such law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be decided not by what has been done under it, but what may by its authority be done. The legislature prescribe the

kind of notice and the mode in which it shall be given, but it cannot dispense with all notice. * * * * * * *
(190) Can it be that when the public takes land for a public highway the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard? The legislature can no more arbitrarily impose an assessment for which property can be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of this 'without due process of law,' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal or state constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation." * * *

Stuart vs. Palmer, 74 N. Y., 183, 188.

"It will be perceived at once that this ordinance is fatally defective. It assumes there is property which will be specially benefited to the extent of this very large assessment, although the town has taken no measure to ascertain that fact, but arbitrarily directs the imposition of this sum as a tax upon property benefited, though it might well be that the aggregate of all special benefits to be derived from the improvement would be but a small fraction of the sum assessed. * * * *
The principle of proportion between different lots was indeed preserved, but that was all. Inasmuch, then, as the ordinance disregards the principle of equality between burden and benefit, and imposes this tax upon the property benefited, though the benefit may be but a fraction of the tax, we must hold it void upon principles well settled in this court."

Greely vs. The People, 60 Ill., 19, 21.

Where the defendant was the owner of a strip of land 11 feet 7 inches wide on the east side of the street, and on the west side of a street of 7 feet 5 inches wide, and the land was assessed for an aggregate sum of three thousand dollars, and the lots, after the paving had been completed, were not worth to exceed one thousand dollars the court say (page 167):

"In considering a question of constitutional protection, the nominal source of the assumed power is of far less moment than the facts of its exercise. The power of taxation is inferred from the general grant of legislative authority, but, like all general grants, it must yield whenever found in conflict with any special restriction. The restriction requiring just compensation when one's property is taken for public purpose is usually ap-

plicable in practice to the power of eminent domain. If, however, in a peculiar state of facts, it shall be found direcly hostile to a certain exercise of the taxing power, or of any other power, the restriction will be supreme and the power must so far be surrendered. * * * (168) It is thus seen that while special remuneration has no concrn with taxation for general purposes, it is indispensable with the theory which sanctions assessments for local improvement. If the special 'remuneration in the way of benefits' be limited, then the improvements are exclusively in the interest of the general public, and the money raised to pay for them is in effect a section of the 'general revenue for the public at large,' levied 'under the guise of local assessments.' This is literally confiscation which is merely a mode forbidden like every other of taking private property for public purposes without just compensation to the owner."

Zoeller vs. Kellogg, 4 Mo. App., 163,

XIII.

The principles applicable to assessments for local improvements, to be deduced from the foregoing authorities, are:

(1) The legislature may create or authorize the municipality to create a local taxing district for local improvement purposes, which includes part only of the property within the municipality, but no land can be included in the assessment district which is not benefited.

(2) Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits.

(3) The taxing district as a whole may be assessed only to the extent of the total sum of the special benefits actually received by the several parcels of contributing property.

(4) The improvement, so far as its costs exceeds the total amount of the special benefit to the municipality at large, and such excess must be borne by the general treasury.

(5) Property owners affected by the improvement within a taxing district are entiled to a hearing on the question of special benefits.

From these principles it necessarily follows:

(a) That the legislature cannot conclusively fix the district, and determine what lands are benefited by the improvement.

(b) That the legislature cannot conclusively determine the

total amount of the benefits to be assessed upon the entire district, or the amount of the benefit to be apportioned to any particular description of land within the district.

(c.) That the legislature cannot make an arbitrary assessment or adopt an arbitrary basis for determining the amount of benefits accruing from a local improvement.

(d) That no assessment of benefits, whether made by the legislature itself or by municipal authorities, under the authority of the legislature, can be sustained, unless the taxpayer is given an opportunity to contest the validity and amount of such assessment and the liability of his property to be assessed for such improvement.

It remains to be seen whether the charter of the City of Detroit is in conflict with these principles.

"The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for the cross-walks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district."

Sec. 35, Chapter II., Charter of Detroit.

"The board of assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, constituting a local assessment district, as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof."

Sec. 37, Chapter II., Charter of Detroit.

Sec. 8, chapter 32, of the ordinances of the City of Detroit, (P. 7), provides that the assessors shall make assessment for paving in accordance with section 37, chapter II., of the charter of the City of Detroit.

The common council of the City of Detroit, in the proceedings for paving Woodward and Blaine avenues, included in the assessment district for paving of each street, the lots and parcels of real estate abutting on that part of the streets paved.

It is expressly alleged in the bill of complaint that "the entire cost and expenses of paving said section of Woodward avenue from Pallister avenue to Joy road, amounting to $55,634.78, except the cost of paving the intersection of streets and

alleys, was assessed upon the property abutting upon said Woodbridge avenue between Pallister avenue and Joy road, including said lot 103, pro rata, according to the frontage thereof on said Woodward avenue, without any regard to the benefits accruing to said several descriptions of property by reason of such grading and paving;" and that "the entire cost and expense of paving said Blaine avenue, from Woodward avenue to Hamilton Boulevard, amounting to eleven thousand four hundred sixty-two dollars and thirty-two cents, ($11,462.32), except the cost of paving the intersection of streets and alleys, was assessed upon the property abutting on said Blaine avenue between Woodward avenue and Hamilton Boulevard, including said lot 103, pro rata, according to the frontage thereof on said Blaine avenue, and without any regard to the benefits accruing to such several descriptions of property by reason of such grading and paving."

These allegations are expressly admitted by the answer. (R., 23.)

So that we have a charter requiring the entire cost of an improvement to be assessed upon the lots abutting on the part of the street paved according to frontage, without any reference to benefits. We have a proceeding of the common council establishing an assessment district in accordance with the provisions of the charter, and it is expressly alleged by the bill and admitted by the answer that these assessments were made upon the property fronting on the street, pro rata, according to the front foot. So that it conclusively appears that the question of benefits was not considered in any way in assessing for this improvement, but that an arbitrary assessment of the entire cost was made on the property, according to frontage, as required by the express provision of the charter.

It is claimed by counsel for plaintiffs in error that the charter provides the taxpayer with sufficient notice and hearing to constitute due process of law.

The only provision in the charter which can be said to provide for any hearing whatever is found in section 37 of chapter II., where, after providing that the property shall be assessed according to frontage, it says:

"When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper that such roll is completed and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of said roll, sign the same and report it to the common council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections, and when the same shall be so corrected

to the satisfaction of said council, it shall, by resolution, confirm the same."

After the rolls for the assessment on Woodward avenue was made, a notice published which, after giving names of owners appearing on roll, was as follows:

"The common council of the City of Detroit having ordered so much of Woodward avenue, from the north curb line of Pallister avenue to the center line of Joy avenue, to be graded and paved, notice is hereby given that an assessment has been made upon all the lots and premises fronting on said Woodward avenue and liable to be assessed for said improvement under the provisions of the city charter, and that a roll of said assessment is now completed and will remain at the assessor's office in the City of Detroit, from the date hereof until the 4th day of April next, for the inspection of all persons concerned therein."

A similar notice was published in the matter of the paving of Blaine avenue.

The charter provides for no hearing before the common council, or any other body authorized to hear and determine the validity and amount of the assessments for paving. The only object or benefit which could be derived from the inspection would be to see whether the mathematical calculation of frontage, the verification of the apportionment of the cost of the paving upon the several lots according to frontage, and under the express provisions of the charter the council or assessors could make no other correction.

This construction of the charter is confirmed by the proviso contained in section 35 of chapter II., which is as follows:

"Provided, that if the assessment made on any such lot or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the common council to be inequitable, said council may direct a just portion of such assessment to be paid from the general road fund."

This provision, which expressly gives the common council authority to make a deduction in the assessment under certain circumstances, by implication, prohibits the exercise of that power by the council except in the cases specified.

Dwarris on Statutes, 72.

In a case where a charter which required the cost of paving to be assessed according to foot front, and provided for the publishing of the following notice: "Persons owning property on (street) are hereby notified that the roll of ownership showing the amount of the special assessment tax levied against the owners of property above referred to, to cover the cost of improvement made in accordance with the resolution of the city council relating to the same, adopted (date), has been placed in the office of the city secretary for inspection in order that all persons interested therein, or to be affected thereby, may have an opportunity of calling the attention of the city council to any

errors or mistakes connected with such assessments levied against property owned by them as shown in said rolls." The charter also provided that within ten days after the first publication of the notice, the property owner may "by a petition to the city council, filed with the city secretary, object to any such acts and proceedings, and show wherein they have been or may be wronged or injured thereby, and to ask for a revision or correction of the same. And they shall be permitted, and it shall be their duty before the final approval of such roll, to appear in person or by agent or attorney, before said city council, and not thereafter at any time before any other tribunal, * * * * and apply for redress for such wrong or injury and for the correction of such errors as they may point out and establish to the satisfaction of said council."

The court say: "The foregoing provision of the charter authorized the property owner to call upon the city council to revise and correct errors committed in the proceedings had in assessing the cost of the improvement against his property, but it does not empower the council to do anything that it or its officers could not have done in the first instance. The words 'revision' and 'correction' mean that the council may be called upon to review that which had been done and to make the proceedings conform to the law. (Citation.) The city council, and the officers acting under the authority of the charter of the city of Houston, having no power in the first instance to consider the question of benefits in fixing the amount to be charged against Mrs. Hutchinson's property, a revision and correction of the acts done could not give relief against the wrong complained of."

Hutchinson vs Storris, 92 Tex 685

A statute similar to this was before the Circuit Court of the United States for the District of Indiana, the court say: "It is clear that the statute under which the present proceedings are prosecuted, provides that the entire cost of a street improvement, except for street and alley crossings, shall be assessed against the abutting property by the frontage measurement, without any regard to the special benefits received by it. It provides for no notice and hearing to ascertain and determine the actual benefits specially received by the land owner by reason of such improvement. The only notice and hearing provided for is one to revise and correct the report and estimate of the engineer so as to make it conformable to the basis of assessment prescribed in sections 3, 4 and 6."

Charles vs. City of Warren, 100 Fed. R., 538,

It is suggested that the legislature in adopting the foot-front rule for the making these assessments investigated the facts and in the exercise of its discretion determined that this was an equitable method of apportioning the cost of the improvement.

The provision of the charter of Detroit authorizing the assessment of paving by front foot has been in force for upwards of forty years, and while it provides for the mode of assessment, it confers upon the common council unlimited power to make such pavement as they see fit, no matter how expensive it may be, and the cost of the pavement is to be assessed upon the property.

Unless the legislature is endowed with the omniscience of deity, they could not possibly know beforehand what kind of pavement was to be laid, or what the cost of the pavement would be, or that the property assessed would be worth the amount of the assessment; and therefore it could not have used any discretion in the matter at all.

It is elementary law that officers who have a discretion, must exercise that discretion in each case, when an arbitrary rule adopted the proceedings are void as an abuse of discretion.

It must appear from the act itself that the legislature exercised its judgment upon these questions which form the fundamental basis of an assessment. No valid tax should be levied for such purpose except upon the theory that the property was by so much increased in value. In fixing this arbitrary rule to be applied in all cases, under all conditions, for an indefinite time, without opportunity for a hearing or review, is it not self-evident that the legislature did not consider the questions of benefits at all? To our mind the act is so drastic and arbitrary as to show upon its face a complete failure to exercise any judgment whatever upon that question."

County of Ramsay vs. Lewis, Mo. Rep'r.
(Decided, Feb. 7th, 1901.

In any view of the case we cannot see how these provisions of the charter can be reconciled with the rights of defendant under the constitution of the United States, and therefore the charter, being in conflict with the constitution, must be held to be void.

XIV.

The defendant in error was not a petitioner for the improvement, and his silence or delay in objecting to the proceedings, cannot in any way prejudice his rights.

Both of these streets are public highways, under the control of the City of Detroit, and the charter expressly provides that the common council may "provide for working and improving all highways, streets, avenues, lanes, alleys and public places within said city, and may assess and levy upon the taxable

property within said city and may expend such highway taxes therefor as may be necessary."

CHAPT. 7, SEC. 33, CHARTER OF THE CITY OF DETROIT.

Under this provision of the charter, the common council had full power to improve and repair the streets. There was no way by which the complainant could have prevented the paving of these streets even if he had so desired. As the charter authorizing the assessment of these paving taxes upon the property was unconstitutional, he was bound to take notice of such unconstitutionality, and would know that there could be no charge made upon his land for such paving, and his mere silence could not in any event estop him from setting up the fact that the statute was unconstitutional and the assessment void.

"When a statute is unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which consequently is to be regarded as having never at any time been possessed of any legal force."

Cooley's Const. Lim., 224.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

Norton vs. Shelby County, 118 U. S., 425, 442.

"The finding of the court in this case is that Mary J. Agler was not a petitioner, and that she remained silent until the improvement was made and the bonds of the city for the payment of the same had been negotiated; yet that she had knowledge that the improvement was being made at the time thereof. It is also found that her property was benefited by the improvement to the extent of four dollars per front foot and no more. We think the judgment in this case should be affirmed. The act under which the proceedings for the improvement were had was invalid. * * And she was in no way a promoter of the same. * * * Neither the city in causing the work to be done, nor the contractor in doing it, were trespassers as to her, although the proceedings were invalid. The title to the street was in the city, not in her. Its improvement was no injury to her and she could not prevent it by any proceeding she could adopt, as she might have done, had it been an improvement upon her own land. She was not called on to do

anything until steps were taken to make the assessment upon her property."

Columbus vs. Agler, 44 O. St., 486.

Where suit is brought to enjoin the collection of taxes for paving a street, and it was alleged in the answer that the plaintiff had knowledge of and acquiesced in the improvements, the court say (page 44:) "The law under which these taxes were attempted to be levied and collected has been by the supreme court of this state declared unconstitutional. It, therefore, can have no operation. An unconstitutional act is not a law. It confers no rights, it imposes no duties, it affords no protection, it creates no office. It is in legal contemplation as inoperative as though it had never been passed."

Wyandotte Co. vs. Kansas City &c. Ry. Co, 5 Kas., App. 43.

XV.

Where the basis of an assessment is illegal, as in this case, it is not necessary as a condition of relief being granted to complainant, to tender any sum as representing what might be the excess of cost over any benefits accruing to the property.

In *Norwood vs. Baker*, 172 U. S., 269, the Court say, (page 291.) "The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the cost and expense assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only proper one. Nor is the present case controlled by the general principle announced in many cases, that a court of equity will not relieve a party against an assessment for taxation unless he tenders or offers to pay what he admits or what is seen to be due. * * * (293) The present case is one in which, as in most of the cases brought to enjoin the collection of taxes or enforcement of special assessments, it cannot be plainly or clearly seen from the showing made by the pleadings that a particular amount if no more is due from the plaintiff, and which amount be paid or tendered before equity would interfere. It is rather a case in which any assessment is illegal. In such a case it was not necessary to tender as a condition of relief being granted to the plaintiff, any sum as representing what she supposed or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, with-

out making such a tender, to ask the court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights. In our judgment, the circuit court properly enjoined the enforcement of the assessment, as it was, without going into proofs as to the excess of the cost of opening the streets over special benefits."

Norwood vs. Baker, 172 U. S., 269, 291.

In *Hayes vs. Douglass County*, 92 Wis., 429, where a suit was brought to set aside paving assessments, the court say, (page 444:) "Because the defects go to the very foundation of the assessment, and make it necessarily unequal, the plaintiff is not required to pay his proportion of the assessment as a condition of relief."

Hayes vs. Douglass Co., 92 Wis., 429.

"It is urged by defendant that the plaintiff should but did not show the excess of taxes over which she would have been obliged to pay had she been legally and properly assessed. Such undoubtedly is the general rule. But where the illegalities are such that it is impossible to ferret out the legal from the illegal taxes which the taxpayer should pay, the rule does not apply."

Solomon vs. Oscodo, 77 Mich., 365, 368.
Aud. Gen. vs. Prescott, 94 Mich., 190.

XVI.

It must be borne in mind that the question in this case is distinctively a federal question, and that cases decided by state courts under the peculiar provisions of state constitutions, as well as all cases decided prior to the adoption of the fourteenth amendment to the constitution of the United States, can have no weight in the the decision of this case.

It will be observed that in the cases decided in New York, as well as most of the other states, the decisions are expressly based upon the ground that there are no provisions in the state constitutions which limit the power of the legislature in respect to taxation; while the question in this case is as to the effect of the fourteenth amendment upon the powers of the legislature in regard to special assessments.

Since the decision in *Norwood vs. Baker*, the supreme courts of the states of Massachusetts, Texas, Indiana and Minnesota, together with the United States circuit courts in New York, Indiana, Missouri, Ohio, Georgia, Washington and Michigan, have applied the principles in that case to paving assessments, and have held assessments made under charters similar to the charter in this case to be within the principles of that

decision, and void; while the supreme courts of Michigan, Missouri and North Dakota have declined to follow the decision in *Norwood vs. Baker*, for the alleged reason that the facts in the Norwood-Baker case were different from those in the cases mentioned, and that therefore, the principles announced in that decision are not applicable in a paving case.

The distinction attempted to be made by these courts between the decision in the case of *Norwood vs. Baker*, and paving cases where the assessment is made by an arbitrary method, cannot be sustained. While that case was a street opening case, still, after the amount of the damages for taking the land had been finally ascertained, the assessment of those damages upon the property benefited would be made in the same manner and governed by the same principles as the assessment for any other street improvement.

The case at bar is a good illustration of the inequity of the rule for front foot assessments. The property is a corner lot, facing and having a frontage on Woodward avenue of sixty-nine feet. Woodward avenue, as appears by the testimony, is one of the main thoroughfares in the City of Detroit, and practically a boulevard. It extends from the Detroit River north, through the City of Detroit and the village of Highland Park, about six miles, to a park belonging to the City of Detroit, known as "Palmer Park." This street was paved by the common council with asphalt pavement seventy feet wide, and the entire cost of the paving was assessed upon the property abutting on the street *pro rata* according to foot front, the cost amounting to between seven and eight dollars per foot.

For all purposes of the persons living on this street, a thirty foot pavement would have been just as beneficial to the property as the pavement which was made, but for the public convenience in traveling over this street from the city to the park, the street was paved seventy feet wide, in order to give wide driveways on each side of the street railway tracks.

This lot extends back along said Blaine avenue two hundred feet, with a depth on Blaine avenue of sixty-nine feet, while all the lots lying west of this lot on Blaine avenue are one hundred twenty-seven and one-half feet deep, and front on Blaine avenue. So that the benefit to defendant's lot by the paving of Blaine avenue is small as compared with the benefit to those lots which front on Blaine avenue and use the same for travel; yet under this arbitrary assessment defendant's lot is assessed the same amount per foot front as the lots which face upon the street.

It is not true, as claimed by the plaintiff in error, that property is alwaye benefited by the paving in front of it. A lot may be so situated that the paving and grading of the street will require the filling in or the cutting down of the lot so as to meet the grade at an expense greater than the cost of the pavement or the value of the lot, and it is then in such cases that the lot would not be benefited by the paving.

A special assessment for paving, to be valid, can only be made after a full hearing and investigation of the facts relating to the paving and to each specific piece of property to be assessed, and which investigation the taxpayer is entited to be present and be heard. "What seems to be the most equitable and just method of attaining the uniformity and equality in the apportionment of local assessments is, that by which each piece of property after being viewed by assessors or commissioners, or other officers appointed for the purpose, is assessed according to the benefits which, in their judgment, such property will receive from the improvement."

Cooley on Taxation, 522.

This is the first time, with the exception of the case of *Norwood vs. Baker*, when the question of special assessments has come before this court as a distinctively federal question. The authorities are conflicting, the old cases holding that the legislature has absolute power in the matter of taxation, the later cases holding that the legislature has not absolute power, but that the party is entitled to a hearing on all the questions involving the validity and amount of the assessment.

It would seem that the later cases are based upon the correct principle governing special assessments, and are in full accord with the constitutional rights of the citizen.

We submit, that the judgment of the court below should be affirmed.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

See over for
Corrections

Office Supreme Court
FILED
MAR 27 1901
JAMES H. McKENNEY,
Clerk

(17,898.)

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING, AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

CORRECTIONS IN BRIEF OF DEFENDANT IN ERROR.

The citation from *Detroit vs. Judge of Recorder's Court, 112 Mich., 588 and 598*, on page 26 of brief, should read as follows:

"The jury are required to assess one-half upon the assessment district, regardless of whether it is benefited to that extent, and are clothed with power to assess a larger amount only when they conclude that the benefit exceeds fifty per cent. The legislature has *no* power to fix an arbitrary percentage of a public improvement to be imposed upon a local assessment district, regardless of the benefits received."

The case of *Minnesota vs. Pillsbury*, cited on pages 26 and 35 of the brief, will be found reported in the 85th N. W. Reporter, page 175.

The case of *County of Ramsey vs. Lewis*, cited on pages 3[illegible] and 46 of brief, will be found reported in 85th N. W. Reporter, page 207.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 411.—October Term, 1900.

The City of Detroit and others, Appellants, vs. Ralzemond A. Parker. } Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

[April 29, 1901.]

Mr. Justice Shiras delivered the opinion of the Court.

This was the case of a bill in equity filed in the Circuit Court of the United States for the Eastern District of Michigan by Ralzemond A. Parker, a citizen of the State of Michigan, against the city of Detroit and certain officers of said city, seeking to set aside certain assessments and tax sales of complainant's land for the paving of Woodward and Blaine avenues in the city of Detroit. The paving in question was done in pursuance of certain statutes of the State of Michigan, constituting the charter of the city of Detroit, and of ordinances of the common council of said city.

There was no allegation or proof that, in the proceedings which resulted in the making of the improvements and in assessing complainant's lots for a portion of the costs thereof, there had been any disregard of the provisions of the statutes and ordinances, or that complainant's property had been charged differently from that of the other lot owners. Nor was it alleged that the portion or share of the cost of making the improvements assessed against complainant's property in point of fact exceeded the benefits accruing to each property by reason of such paving.

The only foundation of the bill was the allegation that "the said statutes and ordinances providing for the paving and grading of streets are in violation of the rights of the complainant under the Fourteenth Amendment of the Constitution of the United States, in that they do not provide for any hearing or review of assessments at which the property owner can show that his property was not benefited to the amount of such assessments, but that the same shall be made arbitrarily according to the foot front."

The case was thus disposed of by the learned judge in the Circuit Court:

"It is the claim of complainant that the charter, in the provisions mentioned, that the entire cost of the street improvements, except for street and alley crossings, shall be assessed against the abutting property by the fronting measurement, without any regard to the special benefits received by the property or their relation to the cost of the improvement, is in conflict with the Fourteenth Amendment of the Constitution of the United States, and is null and void; that such legislation constitutes taking of property without just compensation, and is a denial of equal protection of the law. The

case of the village of *Norwood* v. *Baker*, (176 U. S. 269,) is the foundation for this position, and seems fully to sanction it. . . . The Supreme Court of Michigan has declined to depart from its decisions sustaining the constitutionality of like statutes providing for assessments per foot front, on the ground that the ruling in *Baker* v. *Norwood* must be confined to the facts of that case and have no application to an assessment for paving. With all respect for that learned tribunal, I am constrained under the cases cited to a different opinion of the decision, and to follow the Supreme Court of the United States upon the construction of the Fourteenth Amendment of the Federal Constitution."

Accordingly a decree was entered in accordance with the prayer of the bill, and a perpetual injunction was issued. (*Parker* v. *City of Detroit*, 103 Fed. Rep. 357.)

This court has recently decided, in the case of *Cass Farm Company* v. *Detroit*, affirming a judgment of the Supreme Court of Michigan, that "it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker*." (181 U. S. ——.)

Like conclusions were reached, after a full consideration of the authorities, in *French* v. *Barber Asphalt Paving Company* and in *Wight* v. *Davidson*, (181 U. S. ——.)

The decree of the Circuit Court is reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint.

True copy.

Test:

Clerk Supreme Court, U. S.